

Health Benefits for Same-sex Partners: Practical Considerations and Philosophical Underpinnings of University Policy Development

by

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A dissertation submitted in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy in
(Higher Education)
The University of Michigan
2011

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DEDICATION

In honor of my father, Gregory Lloyd Smith, the first geographer at California State University Dominguez Hills.

ACKNOWLEDGMENTS

To Astrid Giese, my love and my muse: without you I would never have completed this gargantuan task. To Mom for unqualified support—financial, but most especially—emotional. To Diane at Harvard for inspiring me to pursue my passion. To my CSHPE sisters: Kaluke, Marie and Helen, with whom I had so much fun, and who inspired and pushed me. To Jeanne: for helping me adjust to life as a graduate student and for being excellent company along the way. To Heather for her continual support—first with the quantitative learning curve and last with understanding religious objections to homosexuality. To Frank for endless coffee and pie runs, all night formatting sessions, and hockey on the Huron; I could not have managed without you. To Mark B for taming technology. To Jana for reading tedious drafts and pouring bourbon. To Monika for helping me navigate the social work literature and rock. To the phenomenal Lisa S for help with editing. To Pete and Xu, my dissertation buddies, whose advice and support was particularly important during the last year of writing; you will always be a part of this process in my mind! To my Committee—Steve, Liz and Mike—for challenging me and for giving me ample room to explore. To the department and the Spencer Foundation for early and critical funding. And last, but certainly not least, to my mentor Ed: you inspired me with your immense generosity, drive, and confidence in humanity. It has been a thrill to ride these intellectual currents with you.

I owe this accomplishment to everyone listed here, and to many others who generously offered guidance and support along the way.

Table of Contents

DEDICATION.....	ii
ACKNOWLEDGMENTS.....	iii
LIST OF TABLES.....	viii
LIST OF FIGURES.....	ix
ABSTRACT.....	x
CHAPTER I.....	1
INSTITUTIONAL DIMENSIONS AND MORAL FOUNDATIONS	1
Introduction	1
A Map for Readers	3
Institutional Logics at Work	3
Adding a Normative Dimension	4
Why Combine Social Science with Social Philosophy?	5
A Note on Definitions	9
Legal and Social Climate for Changes in Higher Education Health Benefits	10
The Changing Structure of Families	10
The Significance of Changing Family Structures to Social Justice	12
A Crisis in Health Care	13
Legislation on Gay Family Issues	17
Relevance to Higher Education	22
Significance of the Study	23
CHAPTER II.....	27
A PHILOSOPHICAL FRAMEWORK FOR THE STUDY OF WORK-FAMILY POLICY	27
Why does Theory Matter?	29
The Capabilities Approach	30
Use of the Capabilities Approach in Higher Education Literature	38
Changing Conceptions of Family	40
Applicability of Theory to Work-Family Policies	41
Public and Institutional Policy: Differing Thresholds of Human Capability	46
Using the Human Capabilities Approach to Understand the Possible Effects of Work-Family	50
Policy on Tenure-Track Faculty	50
Three Models of Work-Flexible Policy	54
Gender Equity Model	55
The Work-Family Model	58
The Market Model	61
Mapping the Work-Flexible Policy Models to the List of Capabilities	63
Conclusion	66
Chapter Summary	67

CHAPTER III	68
THE INSTITUTIONAL LOGICS APPROACH	68
Literature Review	68
What are Institutional Logics?	69
An Example of Institutional Logics at Work	73
Conceptual Framework	75
Research Questions	77
Chapter Summary	79
Chapter IV	80
RESEARCH METHODS	80
Site Selection	84
Gaining Access	85
Data Collection	85
Sample Selection	85
Secondary Data Collection	90
Document Collection	90
Data Analyses	92
Limitations	93
Chapter Summary	94
Chapter V	95
LOGICS USED BY THE PROPONENTS OF PROPOSITION 2	95
God and Marriage	97
Reproduction and Childrearing	101
The Sanctity of Human Life	103
Views on Homosexual Marriage	106
Misrepresentations of Gays and Lesbians	107
The Moral Foundation of the “No Same-sex Marriage” Position	109
Nussbaum, the Capabilities Approach and Proposition	111
Michigan’s Proposition 2 and the Central List of Human Capabilities	119
Bodily Integrity	121
Emotions	122
Affiliation	123
Control over One’s Environment	124
Conclusion: Proposition 2 is an Unjust Law	126
Chapter Summary	127
CHAPTER VI	129
DESCRIPTIVE CASES	129
Case No. 1: New Middle West University (NMWU)	129
Case No. 2: Great Lakes University (GLU)	140
Case No. 3: Industrial Heartland University (IHU)	145
A Look at the Numbers: Benefits Enrollment Data	151

Chapter Summary	156
CHAPTER VII	157
THE LOGICS OF ENACTING SAME-SEX HEALTH BENEFITS WITHIN HIGHER EDUCATION	157
University Adaptation and the Interplay of Logics	157
Market Logics	158
Recruitment and Retention	160
Cost-containment	165
The Logics of Compliance	171
The 14 th Amendment and Anti-discrimination Law	172
Case Law related to Marital Status and Health Benefits	181
Union Contracts	183
Political Logics	189
Higher Education Politics Related to Sexual Diversity	192
State Politics Related to Sexual Diversity	196
Strategic Logics	200
Interplay of Logics over Same-sex Health Benefits among Universities in the Study	207
Equity Logics	208
Chapter Summary	211
CHAPTER VIII	212
CONCLUSION	212
Implications of Selected Findings	212
The Predominance of Market Logics	212
Cost Containment	214
Diversity and Equity Logics are Muted	216
Summary	220
Integrating the Human Capabilities approach with Data from the Study	222
Suggestions for Practice	228
Contributions of the Study	230
References	231

LIST OF TABLES

Table 1. State Laws Regulating Relationships	18
Table 2. Sample Distribution	88
Table 3. Human Functional Capabilities Disabled by Michigan's Proposition 2	120
Table 4. All Enrollments in DP Benefits (pre-Proposition 2) and ODB Benefits (Post-Proposition 2) for Universities in the Study	153
Table 5. Logics and Goals Enacted by the Institutions in the Study	158

LIST OF FIGURES

Figure 1. Gender Equity Model	57
Figure 2. Work Family Model	60
Figure 3. Market Model	62
Figure 4. Implementation Dates for Domestic Partner Benefits (DP) Policies and Other Designated Beneficiary (ODB) Policies for Universities in the Study	142
Figure 5. Same-Sex Partner Enrollments pre-and Post Proposition 2	152
Figure 6. Interplay of Logics over Same-sex Health Benefits	210

ABSTRACT

Health Benefits for Same-sex Partners: Practical Considerations and Philosophical Underpinnings of University Policy Development

by

Gilia Cobb Burlingame Smith

Chair: Edward P. St. John

This dissertation examines university employees' access to public health benefits in the state of Michigan, following the 2004 passage of a constitutional amendment banning gay marriage. Proposition 04-02 was interpreted by Michigan courts to mean that under traditional eligibility schemes, public employers could no longer offer health benefits to the same-sex domestic partners (or the children of same-sex domestic partners) of employees. How Michigan's research universities responded to this change in public policy illustrates the complex array of moral and strategic concerns undergirding the issue of health benefits for gay and lesbian faculty and staff. This multiple case study is derived from an institutional logics methodology. Drawing from a multitude of sources, including interviews, secondary data collection and document analysis, it reveals four contested logics at work behind institutional decision-making. Presented in order of magnitude, these are: market logics, compliance logics, political logics and diversity logics. The recognition that LGBT faculty and staff are essential to

institutional competitiveness and recruitment initiatives emerges as an important consideration. Against the backdrop of retrenchment and fiscal austerity particular to public higher education, cost containment plays a variable role, first as a material and later as a cultural consideration. These findings, and others, provide insight into the implications of the broader fight over the institution of marriage and the movement for gay civil rights for public higher education. Elaborating upon this empirical platform, the study develops a new rubric for evaluating the fairness of work-family policy in higher education. Harnessing the Human Capabilities approach from political philosophy it evaluates the organizational adaptations of Michigan's higher educational institutions to the new regulatory environment. This research offers several contributions to the field: a substantive analysis of access to health benefits for same-sex partners and family members, and its importance to recruitment and retention in higher education; the identification of an evolving definition of diversity in which sexual orientation plays an increasingly important role; a deeper understanding of the tension between material and cultural considerations in institutional decision-making; and a powerful new theoretical construct for the normative evaluation of public policy and organizational change in higher education.

CHAPTER I

INSTITUTIONAL DIMENSIONS AND MORAL FOUNDATIONS

Introduction

Michigan faces twin deficits. It faces a mounting economic deficit. It also faces a mounting political and cultural deficit, where the state is increasingly perceived as hostile and intolerant environment, and where values of openness and diversity are not cultivated. The economic woes are well known. Michigan has the highest unemployment rate in the country. The State is losing its traditional manufacturing base. These problems are structural and will not be solved quickly or easily. It will take sustained and coordinated efforts on many fronts. One of these fronts will be creating more open social and cultural environment for businesses and individuals. (Hammer, 2009, p. 2)

This multiple case study examines a new problem in higher education research: how universities have responded and continue to adapt to state regulations that prohibit the extension of health benefits to the domestic partners and nonbiological children of public sector employees.

Access to employer-subsidized health insurance is a topic that crosscuts several domains within higher education. It centers around the question of whether some faculty and staff should receive benefits that others do not. It reveals many of our commonly held assumptions about family formation. It prompts uncomfortable

questions about how diverse and inclusive our universities truly are and about the values they institutionalize or validate and those they ignore or exclude. Because access to employer-subsidized health insurance invokes a complex web of values and demands practical action of public universities to address legal restrictions on benefits for gay faculty and staff, this problem offers an unusually rich opportunity to explore the methodological tools used in education research with significant real-world data. My choice of research methodology is uncommon, but not unique: an institutional logics approach, rooted in data collection. However, in an effort to make the most of this opportunity, I stretch conventional research methods by integrating a normative theoretical framework from social philosophy.

In addition to providing an evaluation of organizational adaptations, my research borrows from the human capabilities approach in social philosophy to offer a new framework with which to flesh out the underlying values inherent in this particular policy debate. Less ambitiously, perhaps, but still important to the way we use data in higher education research, I combine quantitative and qualitative methods of collection and analysis to securely underpin an analysis that withstands utilitarian considerations and philosophical questions.

This dissertation, then, has two purposes. 1) To apply a social justice framework to explore the provision of health care benefits to same-sex couples in a hegemonic policy environment that renders this form of equity illegal. 2) To test the construct of institutional logics as a framework for illuminating the strategies universities used to craft legal remedies to the inequalities created by state law.

A Map for Readers

The format of this dissertation is somewhat unusual. In this chapter, I introduce the theoretical platform for the study (both the institutional logics method and the normative framework in which it is situated) and background material on issues related to same-gender couples and health care. I also introduce the topic of same-sex health benefits: its importance to higher education and its relevance to the broader movement toward gay and lesbian civil rights. In Chapter Two, I use the Human Capabilities Approach to construct a normative framework for the consideration of work-family policy, healthcare benefits included, in higher education. I describe the Human Capabilities Approach in detail and demonstrate to the reader its usefulness in evaluating work-family policy. In Chapters Three and Four I discuss the institutional logics approach and the methodology for the empirical study. In Chapter Five, I present the voices of the proponents of Michigan's constitutional amendment banning same-sex marriage. In Chapter Six, I describe each of the cases in the study and close with a quantitative analysis of benefits data from each university. In Chapter Seven, I present the findings from an institutional logics analysis. In Chapter Eight, I summarize important findings from the study and make suggestions for practice.

Institutional Logics at Work

Conflict over same-sex benefits results from inter-institutional tensions (e.g., faith-based beliefs about marriage versus state recognition of domestic partners) and intra-institutional tensions (e.g., market logics versus political logics). The manner in which

Michigan's universities responded to the regulatory, political, administrative and bargaining processes that followed the constitutional ban on same-sex marriage illuminates the organizational mechanisms at work behind these institutional logics. The institutional logics construct emphasizes heterogeneous and emerging logics within the field, and the impact of public policy on higher education's ability to recruit and retain talent. The link between relationship recognition and access to healthcare primarily impacts LGBT (lesbian, gay, bisexual and transgender) campus constituencies, though it also has broader implications for higher education and the social movement for gay rights.

Adding a Normative Dimension

This study has, at its roots, a grand ambition: to conduct a rigorous analysis of institutional logics on the issue of same-sex benefits in public higher education and then to expand the analysis to include the larger ideological and philosophical tensions between religion, capitalism and the state. To explore these institutional logics and normative tensions, I conducted interviews with a broad array of actors inside and outside of higher education in Michigan that included unionized and nonunionized faculty, attorneys, human resource administrators, legislators, provosts and other executive administrators. (See page 76 for the research questions undergirding the study.) Interviews reveal a contested set of logics at work behind the hegemonic treatment of the workforce imposed by state law, to the broader, more inclusive, standard of justice operating among the state's research institutions. These logics

frame policy development and implementation in the public higher education system (Chapters Six and Seven) in ways that sharply delineate it from those instantiated within the contemporary Christian conservative movement (Chapter Five).

The ideological divide over same-sex marriage has produced a policy environment that constrains the public sector's ability to compete for gay talent. This policy environment frames the action of higher educational institutions against the context of individual, organizational, and institutional responses to the larger social battle over gay civil rights. For this reason, I felt it was useful to integrate the empirical study of same-sex benefits into a larger normative framework. This study makes a unique contribution to the higher education literature by harnessing a normative framework called the Human Capabilities Approach (HCA) with which to evaluate the ethics of university adaptations to state law. The HCA, which finds its roots in economics and political philosophy, is apt to this study because it grounds the discussion of organizational change in the context of institutionalized public values and norms.

Why Combine Social Science with Social Philosophy?

The purpose of integrating the institutional logics methodology into the normative framework of the Human Capabilities Approach is to build a bridge between the empirical concerns of social science and the philosophical concerns of a system of justice.

Social science's role in producing cumulative and predictive theory has been criticized by scholars from inside and outside of its ranks. Citing the so-called Science

Wars of the 1990s, Flyvbjerg (2001) notes that natural scientists have long derided the social sciences as anti-rational and relativistic. His central critique is that the separation of fact and value in conventional social and political thinking is untenable and deprives the social sciences of methodological advantages. In a book that evolved from reflecting on the issue and on his own work as a sociologist, Flyvbjerg concludes that social science has lost its power to persuade by too closely mimicking methods used in the natural sciences. He takes the position that the proper role of social science should be “to produce input to the ongoing social dialogue and praxis in a society, rather than to generate ultimate, unequivocal, verified knowledge” (Flyvbjerg, 2001, p. 139).

Looking beyond organizational theory, we find support for Flyvbjerg’s position in examples of scholarship that push beyond the traditional, rationalist constraints. From Michael Walzer we gain an understanding of how difficult it is to bridge the great divide between everyday ethics and the academic study of philosophy.

The study of judgments and justifications in the real world moves us closer, perhaps, to the most profound questions of moral philosophy, but it does not require a direct engagement with those questions. Indeed, philosophers who seek such an engagement often miss the immediacies of political and moral controversy and provide little help to men and women faced with hard choices. For the moment, at least, practical morality is detached from its foundations, and we must act as if that separation were a possible (since it is an actual) condition of moral life.

But he goes on to suggest that the effort to understand the connection between everyday judgments, justifications and deeper philosophical questions is worthwhile.

But that’s not to suggest that we can do nothing more than describe the judgments and justifications that people commonly put forward. We can analyze these moral claims, see out their coherence, lay bare the principles that they exemplify. We can reveal commitments that go deeper than partisan allegiance and the urgencies of battle; for it is a

matter of evidence, not a pious wish, that there are such commitments.
(1977, p. xv)

The shift that Walzer describes above is from explaining the way the norms operate (explanatory theory) to reflecting on whether they are commendable or not (normative theory).

In his piece on the normative case study, David Thacher (2006) argues that Jane Jacobs, Philip Selznick and Bent Flyvbjerg all practice an approach that goes beyond conventional organizational scholarship to combine normative assessment with empirical observation. Of all these scholars, Flyvbjerg goes farthest in explicating and advocating a research paradigm that originates with the Aristotelian concept of *phronesis*. *Phronesis* referred to “a true state, reasoned and capable of action with regard to things that are good or bad for man” (Aristotle, as cited in Flyvbjerg, 2001, p.57). For Aristotle, *phronesis* was one part of the essential triad of intellectual virtues. The triad included *episteme* and *techne*, two concepts that are largely understood in the contemporary sense as they were among the Greek philosophers (Flyvbjerg, 2001). The type of knowledge Aristotle describes, later called *value-rationality* by Flyvbjerg, is pragmatic, variable and context-specific; it is the practical application of ethics in everyday life. *Phronesis*, or *value-rationality* was successively devalued by Socrates, Plato and during the Enlightenment, in favor of instrumental rationality (or *episteme*) and its meaning was lost to modernity. Flyvbjerg invokes the Aristotelian ideal as a vehicle for the reintroduction of ethics and the study of “what ought to be” into the social sciences (Thacher, 2006).

In formulating my own framework for moving beyond organizational theory to normative assessment, I found the Human Capabilities Approach to be a powerful tool for sorting out and analyzing claims about same-sex health benefits. The cool detachment of philosophy and its systematic argumentation provide a valuable counterpoint to the messy process of interviewing individuals and sorting through evidence. Moreover, by incorporating HCA into the analysis, I provide the reader with a substantive account of the logics behind Michigan's referendum banning same-sex marriage, its subsequent legal interpretation prohibiting the recognition of same-sex partners in the state, and university adaptations to the new policy context. While the institutional logics approach alone offered the opportunity to explore organizational values and their underlying motivations, it did not offer the ability to theorize about the fairness or justice issues that are so central to the topic of access to health benefits for gay partners.

By incorporating the two approaches, I follow in the footsteps of Edward P. St. John, who has used the sufficientarian outlook to analyze federal education policy (2006) and to reflect upon the role of moral reasoning in reflective practice in higher education (2009). I also make use of work in philosophy on education, which highlights the role that educational systems should play in society (Anderson, 2007). (See Chapters Two, Three and Eight). My intention in doing so is to make a practical contribution to the study of higher education that bridges the gap between the methodological rigor of higher education research and the normative concerns of philosophy.

A Note on Definitions

For the purposes of clarity and simplicity, I provide three seminal definitions in advance of the paper.

Proposition 2. For the purposes of this paper, this refers Michigan's same-sex marriage ban or Proposition 04-02. By contrast, Michigan's ban on affirmative action is referred to as Proposition 06-02.

DP. In this paper, the DP nomenclature is used to refer to Domestic Partner benefits policies that existed prior to the passage of Proposition 2. At each of the institutions in the study, these policies were *exclusively available to same-sex couples*. After the Appeals Court decision in February of 2007, all of the institutions in the study were compelled to replace DP policies with Other Designated Beneficiary policies.

ODP. Refers to Other Designated Beneficiary. The ODB designation is used in lieu of the actual policy names which would make the identity of the institution readily apparent to readers. ODB policies are available to same-sex couples as well as to unmarried heterosexual couples. In the course of the study, I also heard of rare instances in which nonromantic partners were covered by these policies. Since these appear to be extremely rare cases (perhaps one or two of the 539 benefits enrollments represented here), this category is not elaborated in the analysis.

In legal terms, ODB policies are available to individuals other than romantic partners of either sex. However, since tenants, blood relatives and spouses are explicitly excluded, the number of other possible arrangements is limited. *Prima facie* patterns of usage indicate that it is very uncommon for anyone to enroll another

individual as a beneficiary to their health insurance, unless they are involved in a committed, long term, romantic relationship with that person. The fact that the institutions in the study provided breakdowns in only two categories (same-sex partner and opposite sex partner) supports this proposition.

Legal and Social Climate for Changes in Higher Education Health Benefits

This section of the chapter situates the struggle for lesbian and gay partner health benefits against a broader context of civil rights and social and political change. First, I discuss the changing demographics of the American family, as indicated by declining marriage rates and new types of family formation. I then move on to a brief discussion of the health care crisis, its escalating costs, impact on higher education and on the families of gay and lesbian Americans. Next, I give an overview of the policy and legal issues related to gay and lesbian civil rights and access to health care.

The Changing Structure of Families

Contemporary changes in the family have become a subject of intense moral and sociological concern in the United States in the past several decades. The value of alterations in the form and meaning of family life is being debated widely, as are the apparent consequences of those choices for social and political life generally. (Dolgin, 1997, p. 14)

To put the issue of same-sex benefits into context, it is important to recognize the changing structure of the modern family and to consider how nontraditional and new types of family formation play into the employment decisions that individuals make and the types of work-family policies that organizations adopt. A special report by the U.S. Census Bureau calls the growth of unmarried couples, which increased from 3.2 million

in 1990 to 5.5 million in 2000, “a reflection of changing life styles” (Simmons & O’Connell, 2003).

For the purposes of this study, the new type of family formation in question is primarily—though not exclusively—that of same-sex couples with children. Recent estimates put the number of lesbian, gay and bisexual persons in the U.S. at 9 million, and the number of same-sex couples at approximately 800,000 (Gates, 2006; Roberts, 2006). These numbers constitute an astounding 30 percent growth rate from the year 2000. This growth rate (which is five times the rate of growth in the U.S. population) is thought to be due to reduced stigma around homosexuality and the increasing willingness of same-sex couples to identify themselves on government surveys like the Census Bureau’s American Community Survey (Gates, 2006; Roberts, 2006). One-third of female partner households and one-fifth of male partner households have at least one son or daughter under the age of 18 living with them (Simmons & O’Connell, 2003). a fact which illustrates same-sex couples’ increasing willingness to engage in family formation. Between 2000 and 2005, the largest percentage increase in the number of same-sex couples occurred in the Midwest (Gates, 2006).

In 1930, the proportion of married couples comprised 84% of households in the U.S. But by 2006, after declining for decades, it had slipped to less than half or 49.7% of the population (Roberts, 2006). Now growth is being seen in the proportion of *unmarried* couples (Roberts, 2006; Simmons & O’Connell, 2003; U.S. Census Bureau, 2005a). These shifting demographics include growth in percentages of both unmarried

heterosexual and same-sex couples, which together now amount to nine percent of all coupled households.

The Significance of Changing Family Structures to Social Justice

The unintended effect of anti-gay marriage legislation and referenda is to circumscribe the availability of healthcare to unmarried couples writ large. Thus, the negative impact of anti-gay marriage legislation on recruitment and retention in the public sector is not limited to same-sex couples. Further, there is evidence that this effect may be compounded by race and ethnicity. This is particularly true of American Indians and African Americans who, respectively, comprise the largest proportions of unmarried couples among racial groups in the U.S. (U.S. Census Bureau, 2005b; Simmons & O'Connell, 2003).

Minority groups recognize the slippery slope between not protecting gays and lesbians and failing to protect other types of minorities from legal discrimination. For this reason, the NAACP Legal Defense Fund, the Asian Pacific American Legal Center and the Mexican-American Legal Defense and Education Fund all filed *amici* briefs with the California Supreme Court, requesting that it annul the ban on gay marriage that was passed by voter referendum in 2008 (NAACP, 2009a).

Despite the objections, the court upheld Proposition 8, thereby repealing same-sex marriage in California. In his dissent, Judge Carlos Moreno wrote: "The majority's holding is not just a defeat for same-sex couples, but for any minority group that seeks the protection clause of the California Constitution" (NAACP, 2009a). Following the court's decision, an additional 142 communities of color issued a statement of dissent

(Lambda Legal Defense and Education Fund, 2009). These civil rights groups argued that allowing a bare majority to deny marriage to a minority group was a dangerous precedent which, ultimately, would serve to undermine the rights of other minority groups in the state (NAACP, 2009a; NAACP, 2009b). This raises the narrower question of whether the diffusion of anti-gay marriage policy will affect public institutions' abilities to offer family health benefits to unmarried faculty more generally—straight and gay, black and white, native and otherwise.

A Crisis in Health Care

Cost Considerations

The cost of health insurance rose 59% between 2000 and 2007 (Kaiser Family Foundation and Health Research Educational Trust, 2004). Compared to wage growth of 12% and inflation of 10% during the same period, this makes access to health benefits not only an issue of social justice, but one of financial exigency for many faculty.

In previous eras, when the majority of faculty were married and lived in single-earner households, the legal provision of health benefits to spouses and dependents went unquestioned. Though faculty recruits may have compared the benefit packages in competing offers, there was seldom a question about the receipt of some form of health care. Now, in some instances, lesbian and gay as well as unmarried heterosexual faculty are required to make decisions about employment based on the recruiting institution's willingness to extend health care benefits to her or his family members (Berman, 2007).

Increased litigation and policy dispersion relating to relationship recognition and parenting responsibilities, an increasing percentage of jobs without health benefits (Schmitt, 2007) and the spiraling cost of healthcare (Reid, 2008) suggest that the ability of institutions to work within, or around state legislation restricting health benefits will become a critical to future recruitment efforts in higher education (Wayne State University, 2007). On average, the cost of university health benefits increases by 12% each year (Reid, 2008). Successive increases are forcing many institutions to alter the ratios between what employees contribute and what the employer contributes, by reducing the percentage that the institution pays out (Reid, 2008).

To date, DP benefits at public universities have not been a drain on state budgets. This is mainly due to small numbers of enrollments. However, data from the College and University Professional Association for Human Resources (CUPA) indicate that only 8 percent of all institutions pay all health insurance costs for family coverage (2009). Further, in some instances, the employer portion of domestic partner benefits is paid for out of private donations so that no state money is used (Russell, 2007).

Inequities in Access for Same-sex Couples and their Children

Access to health care is a particularly acute issue for gay and lesbian families due to legal and financial constraints. First, except in a handful of states, same-sex couples are unable to marry. Since marital status confers automatic relationship recognition under the law, the host of rights and benefits associated with it are unavailable to these couples. The benefits and protections of marriage include obvious ones, such as the ability to shelter investments and income by filing joint tax forms, federal exemptions

on monies set aside for employer-sponsored health care and dependent care accounts, the ability to receive public assistance benefits,¹ the ability take an extended family or bereavement leave in the event of a family member's illness or death, and numerous important entitlements related to adoption and child custody (My Family Law, 2010; Simmons & O'Connell, 2003). In 2010, the ability to make medical payments or to visit a spouse or children in an intensive care unit was extended to gay couples across the U.S. by executive order (Mathis, 2010; Webster, 2010). However, among the other rights bundled up in the legal contract of marriage are also those that receive less attention, such as being able to sue on behalf of your spouse, protection from testifying against him/her in a court of law, and automatic shares in community property in the event of a divorce (My Family Law, 2010). Some of these rights are available to same-gender couples, depending upon the laws of the state, the beneficence of the employer (in the case of health benefits or bereavement leave, for example) and the couples' financial ability to hire legal counsel to secure individual benefits, such as Power of Attorney. In any case, access to all of these benefits is dependent on state context, employment conditions and financial resources and many of them are simply unavailable—including health benefits for federal employees and federal tax exemptions. If gay couples want to even approximate the financial and legal security that comes with the bundling of rights under the marriage contract, they must work with legal counsel to assemble each one piecemeal and closely monitor when the relevant contracts expire or must be updated.

¹ Including Social Security, veteran, military and Medicare benefits.

The second reason that the retraction of access to healthcare benefits is particularly critical to lesbian and gay couples, is that they are more likely than heterosexual couples to have nonbiological children in the household. The nonbiological status of the children, in combination with the dearth of legal protections and benefits afforded by marriage leaves the children and partners of many gays and lesbians without access to employer subsidized health insurance. For example, in a single-earner married household with children (adopted or biological) traditional health benefits will cover the employee, his/her spouse and the children. In a lesbian household in which one mother is biological and the other isn't, children are only covered by employer-subsidized health insurance if the biological mother is employed. To make matters more tenuous for many gay and lesbian families, state laws prohibiting adoption by same-sex couples² means that many parents must pay out of pocket for access to health insurance.³ Furthermore, the same-sex partner only has access to the employed partner's insurance if the employer specifically offers health insurance for domestic partners or other eligible beneficiaries.

Last, not least, both federal and state tax laws disadvantage gay and lesbian partners and their families, making healthcare a more expensive proposition for this population than for other Americans. Federal tax inequities alone mean that same-sex partners pay

² Adoption law is dependent on state public policy and is highly variable. It continues to be a major sight of social contestation for gay and lesbian civil rights. Restrictions on adoption come in many forms: in some states unmarried couples are prohibited from adoption, in others only same-sex couples are prohibited and in still others, lesbian and gay individuals are prohibited from adopting children (Human Rights Campaign, 2008b; Simmons & O'Connell, 2003).

³ This is the case in Michigan, where a socially conservative judiciary has prevented same-sex couples from obtaining second parent adoptions, and unmarried couples (both heterosexual and homosexual) are ineligible for joint adoption (Human Rights Campaign, n.d.).

an average of \$1,100 more per year for the same benefits that married couples receive (Bernard, 2010). Over the course of a marriage or partnership, the cumulative financial disadvantage that accrues to same-gender couples as a result of this structural inequity (and many others) is substantial.

Legislation on Gay Family Issues

A study that examines work-family policy, as does this one, should be designed to recognize both the increasing importance of health care to class status among Americans and the fight for gay and lesbian civil rights that is unfolding across the country. Against this context of economic, social and political change, higher education work-family policy, and same-sex benefits in particular, can be viewed as a site of contestation where religious, governmental and industry logics collide.

In its 2007 annual report, the Human Rights Campaign (HRC) tracked the introduction of more than 250 state bills involving issues affecting gay, lesbian, bisexual and transgendered people, including marriage, civil unions and domestic partnerships, hate crimes, parenting and safe schools. Among the 35 bills passed in 2007, was one in South Carolina that identified marriage between a man and a woman as "the only lawful domestic union that shall be valid or recognized in this State" (Edelson, 2007, p. 19) This bill is a single example of a wave of anti-gay marriage bills that have been introduced and passed across the nation since the year 2000. Currently, there are 29 states with *constitutional* amendments restricting marriage to one man and one woman and 15 states with *laws* restricting marriage to one man and one woman (HRC, n.d.). In 18 of these states, the law or amendment has language that affects, or has the potential

to affect, other legal relationships such as civil unions or domestic partnerships. To date same-sex couples are entitled to all of the state-level rights and benefits of marriage only in Massachusetts (Human Rights Campaign, n.d.). While there are other types of laws and policies that affect gay, lesbian, bisexual and transgender communities, constitutional amendments and laws related to marriage are most closely related to the topic of same-sex health benefits. For that reason, though laws and policies related to parenting, employment, other types of relationship recognition, hate crimes and schools have clear implications for sociological and organizational change, they will not be explored in this paper. See Table 1 (below) for an overview of state public policy regulating same-sex relationships.

Table 1. State Laws Regulating Relationships

Type of Policy	No. of States
State Laws Allowing Same-sex Marriage*	6
State Laws Allowing Relationship Recognition for Same-sex Couples (not Marriage)	14
State Laws Prohibiting Same-sex Marriage	38
Constitutional Amendments Prohibiting Same-sex Relationships	29

* Includes District of Columbia
 Source: National Gay and Lesbian Taskforce

An intricate series of events in California brought the state to the fore of the national battle over same sex marriage. In 2004, the Mayor of San Francisco (Gavin Newsom) attended George Bush’s State of the Union speech, in which the President called for a constitutional ban on gay marriage. The discriminatory overtones of Bush’s speech,

particularly in the context of national legislation that already prohibited the recognition of same-sex marriage,⁴ raised the ire of the Democratic mayor, who returned to San Francisco and promptly ordered city officials to begin issuing marriage licenses to its gay and lesbian citizens (Nick, 2010). Newsom's announcement was met with enthusiasm and 4,000 gay couples were married in the three weeks it took the California Supreme Court to put the practice on hold (Nick, 2010).⁵

In response to the court's stay, supporters of same-sex marriage filed legal challenges. Four years later, in the spring of 2008, the California Supreme Court ruled that under California law it was *unconstitutional* to deny same-sex couples the right to marry.⁶

However, in November of the same year, opponents of same-sex marriage succeeded in placing an amendment called *Proposition 8* on the state ballot. The slim passage (52-48%) of this landmark legislation amended the California constitution to retract the marriage rights of gays and lesbians. The passage of the referendum immediately prompted widespread public protest (Nick, 2010; Ruby-Sachs, 2009).

A number of lawsuits were immediately filed against the state, arguing that Proposition 8 was invalid because it dismantled the state's equal protection clause by denying a fundamental right to a historically discriminated against minority group. Several cities and counties in the state, including Los Angeles and San Francisco, also filed lawsuits requesting that the state not enforce the referendum until its

⁴ The Defense of Marriage Act of 1996.

⁵ The California Supreme Court did not rule on whether the marriages were legal or not—it simply ruled that Newsom did not have the authority to issue same-sex marriage licenses in San Francisco (Nick, 2010).

⁶ *Re Marriage Cases* (Nick, 2010).

constitutionality could be determined by the courts (Human Rights Campaign, 2008). Even the Attorney General of California filed a brief with the state Supreme Court arguing that the measure was constitutionally indefensible and should be overturned (McKinley, 2008; American Foundation for Equal Rights, 2010).⁷

The most notable of the lawsuits against Proposition 8 was *Strauss v. Horton*, in which the California Supreme Court upheld Proposition 8. Between the Supreme Court's decision in May of 2008 that the stay on gay marriages was unconstitutional and the passage of Proposition 8 in November of 2008, 18,000 gay and lesbian couples were married in California (Human Rights Campaign, 2008). Supporters of same-sex marriage hired attorneys David Boies and Theodore Olson to bring a challenge to federal court in *Perry v. Schwarzenegger*. This case, which may eventually reach the U.S. Supreme Court, began its review in a California federal district court in March of 2010 (McKinley, 2008; Nick, 2010).

The passage of anti-gay marriage legislation is closely related to the issue of health benefits, because in many states access to benefits is linked to marital status. In states where domestic partnerships are not legally recognized, there is the possibility (already realized in Michigan) that courts can interpret the law to prohibit the extension of public health benefits to anyone who is not married.

To put the issue into perspective, the HRC Report notes that as 2008 began, only 10 states offered some form of recognition to same-sex couples. This in no way means that gay couples in those states are eligible for public health benefits; however, it does mean

⁷ This is a highly unusual move, since technically it is the duty of the Attorney General to defend the state constitution (Nick, 2010).

that one necessary condition for the provision of public health benefits—a recognizable public union—has been met.

The only states in the union that currently offer marriage licenses to same-sex couples are Massachusetts, Connecticut, Iowa, New Hampshire and Vermont (Lambda Legal, 2010). In its landmark decision of 2003, *Goodridge v. Department of Public Health*, the Superior Court of Massachusetts granted all the state benefits of marriage to same-sex couples who were both residents of the state and who wished to marry. These benefits included rights to hospital visitation and the ability to file joint state tax returns. Massachusetts same-sex couples, however, still receive disparate treatment compared to their heterosexual counterparts. Due to the 1996 federal Defense of Marriage Act, they remain ineligible for more than 1,100 benefits associated with marriage, such as Social Security survivor benefits and federal exemptions on health insurance premiums. More than 10,000 same-sex couples have been legally wed since the state began granting marriage licenses in May of 2004.⁸

It is also important that all of the states in which bans on same-sex marriage have been passed have a public referendum option. Whereas in most legislatures there is a two-thirds requirement to get an item on the ballot, a public referendum only requires a small percentage of signatures and a bare majority for passage.⁹ Use of the public referendum mechanism has therefore proven to be an important political

⁸ In June of 2007, the Massachusetts Legislature defeated a proposed constitutional amendment (similar to Michigan's Proposition 2) that would have ended marriage equality in the Commonwealth. In July, 2008, the state repealed a 1913 law that had previously been used to bar out-of-state residents from marrying there.

⁹ The number of signatures vary by state.

strategy for opponents of gay marriage. In fact, the only states, to date where gay marriage bans don't exist are in states where there is no public referendum option.

However, there is reason to believe that a real sea change is occurring with respect to attitudes towards same-sex relationships. Recently, the General Assembly of the United Nations made an historic declaration, calling for the decriminalization of homosexuality across the world (BBC, 2008). Sociologist David John Frank writes:

Worldwide between 1984 and 1995, lesbian and gay social movements expanded, and state policies on homosexual relations liberalized. While significant cross-national variation remains, with many countries still characterized by confining social sanctions and restrictive policies, the trend during that brief period was unequivocal and dramatic: throughout the world, gays and lesbians mobilized and policies against same sex relations, between men and between women, were lifted. (1999, p. 1)

These events suggest that the movement toward gay civil rights is gaining momentum.

Relevance to Higher Education

With the recent dispersal of anti-gay marriage laws across the United States, it is likely that court interpretations of the applicability of state law to government and university health benefits will spark increased public attention. The issue is particularly relevant to public systems of higher education. There is some evidence of a trend in this direction.

In Austin, a lecturer named Uri Horesh went on a nine day hunger strike to protest the University of Texas' refusal to provide health insurance to the partners of gay employees (Campbell, 2008). Horesh argued that the institution was violating its own anti-discrimination policy, which states that it "maintains a work environment free from

discrimination on the basis of sexual orientation" (Jaschik, 2008). During the hunger strike Horesh was offered employment at another institution that does offer health benefits to the families of its' gay and lesbian employees (Campbell, 2008).

During 2007, the trustees of Palm Beach Community College incurred the wrath of constituents when they declined a proposal to offer health insurance to the domestic partners of employees, instead passing a health insurance benefit to cover the pets of married employees (Jaschik, 2007a). More than a year later, after a protracted political battle and a change in the composition of the Board of Trustees, domestic partner benefits were instituted (My So-called Gay Life, 2008).

Significance of the Study

This research is situated in Michigan: its political and social geography, its history of racial and economic strife, its proud legacy of higher education. In 2004, voters passed a referendum amending the state constitution to restricting the institution of marriage to heterosexual couples. Proposition 04-02 read: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose" (Michigan Legislature, 2009). Since Michigan statutes already defined marriage as a heterosexual institution and did not recognize same-sex marriages from other states, the passage of Proposition 2 was widely viewed as the first step in a legal strategy to repeal civil rights for unmarried couples (ACLU, 2005; Gay and Lesbian Alliance against Defamation, 2004). Among the concerns voiced by

constitutional scholars and LGBT advocates were rights related to employment, housing, health benefits and hospital visitation (Gay and Lesbian Alliance against Defamation, 2004).

Indeed, in February of 2007, Michigan's Court of Appeals issued a unanimous ruling interpreting Proposition 02-04 to mean that no state-run organization could offer health insurance or other benefits to the domestic partners (or the children of domestic partners) of employees (Gnagey, 2007). The court's decision hinged on the recognition of same-sex relationships that accompanied the provision of benefits, and it had the immediate effect of eviscerating the state's domestic partnership protections. The contention was that by requiring employees to demonstrate that they were in a domestic partnership, Michigan's colleges and universities were recognizing same-sex relationships in a formal sense that ran contrary to the intent of the constitutional amendment (Jaschik, 2007).

Two public universities filed briefs with the Court of Appeals, arguing that Michigan's Constitution gave considerable autonomy to public higher education and that, therefore, universities should have latitude to provide the benefits. The court rejected this argument, writing that "public universities are autonomous only within their own spheres of authority" (Jaschik, 2007, p. 2). As they waited for the case to be taken up by the State Supreme Court, universities in Michigan scrambled to change the eligibility rules for employee access to health benefits (Jaschik, 2008). In 2008, the Supreme Court upheld the Appeals Court decision, making Michigan the first state in the union where a marriage amendment was interpreted to preclude access to employer-

sponsored health benefits for domestic partners (ACLU, 2005; Gnagey, 2007; Jaschik, 2007b; Strout, 2007).

It is possible to think of the Michigan case as an anomaly— a demonstration of hostility towards a minority group brought on by geographic insularity and economic austerity. After all, polls indicate positive trends in public acceptance of equal rights for gays. A majority of Americans favor legalizing homosexual relations, and the gap between those who are opposed to same-sex marriage and those who are in support of it has narrowed dramatically over the past 15 years (Gallup, 2008; Gallup, 2010; Pew Research Center, 2010).¹⁰

But the culture war over same-sex marriage is far from over and its implications for higher education remain uncertain. In 2005, Wisconsin Governor Jim Doyle, concerned about his state's relative disadvantage competing for faculty, unsuccessfully proposed a measure that would provide funding for the health insurance of domestic partners (Russell, 2007). In Ohio, a state representative filed a lawsuit against Miami University, contending that its domestic partner benefits violate the state amendment banning gay marriage (Russell, 2007). In Virginia, the State Attorney General riled students and activists by sending a letter to all public institutions of higher education prohibiting the adoption of non-discrimination policies based on sexual orientation (Vise & Helderman, 2010). In Iowa, three Supreme Court judges who rendered a decision legalizing gay marriage were targeted for removal by the religious right (Crary, 2010). And, in perhaps

¹⁰ When the Pew Research Center first measured attitudes toward gay marriage in 1996, 27% of Americans were in favor of legalizing same-sex marriage and 65% were opposed. At the time that this paper was written, 42% were in favor and 48% were opposed – marking the first time that fewer than half of respondents oppose gay marriage (Pew Research Center, 2010). Competing polls also indicate that opposition to same-sex marriage is now at an all-time low (Gallup, 2010).

the closest analog to the Michigan case, Kentucky's Attorney General allowed the implementation of a "plus one program" to replace the domestic partner policies that were stricken by the state's gay marriage ban (June, 2007; Russell, 2007).

Overshadowing all of these events are two cases winding their way toward the U.S.

Supreme Court: the challenge to California's ban on same-sex marriage and the Obama administration's defense of the federal Defense of Marriage Act of 1996.

CHAPTER II

A PHILOSOPHICAL FRAMEWORK FOR THE STUDY OF WORK-FAMILY POLICY

Systematic arguments of theory have an important practical function to play in sorting out our confused thoughts, criticizing unjust social realities, and preventing the sort of self deceptive rationalizing that frequently makes us collaborators with injustice. (Nussbaum, 2000, p. 36)

Though there are myriad approaches to the study of work-family policy among institutions of higher education, two broad concerns undergird the literature on this topic: work-life balance and gender equity. Researchers concerned with work-life balance have examined the methods institutions use to help faculty (both male and female) balance their responsibilities to work and family (Drago & Colbeck, 2002; Friedman, Rimsky, & Johnson, 1996; Sullivan, Hollenshead, & Smith, 2004). Researchers concerned with gender equity have focused on the conflicts that women face between academic careers and caregiving roles at home; several studies have demonstrated that the model academic career path conflicts with a female faculty member's family responsibilities (Drago & Williams, 2000; Ward & Wolf-Wendel, 2004), while others have linked the limited availability of work-family policies to the slow pace of improvement for women within the professoriate (Mason & Goulden, 2002). More recently, researchers have begun to examine the impact of academic careers on family formation

(Mason & Goulden, 2004) and the ways that male caregivers utilize work-family policies (Rhoads & Rhoads, 2003).

The recognition common to all of the literature on work-family policies among institutions of higher education is the extreme workload associated with the tenure track and its all-encompassing nature. "By its nature, academic work is potentially boundless: there is always one more question to answer; one more problem to solve; one more piece to read, to write, to see, or to create" (Curtis, 2004, p. 22). In a nutshell: the stringent demands of the tenure track mean that for many academics, work interferes with family life and vice versa. As competition for faculty has increased, policies designed to ameliorate this tension have proliferated. The emergence of these policies, particularly among leading research-based institutions, has important implications for the future of the tenure track and for social justice and equity outcomes among the academic workforce.

Notwithstanding the important descriptive and empirical work that has been done on the subject of work-family policy, it can be noted that to date few studies have used a systematic, theory-based approach to the investigation of this emerging policy phenomenon. Such an omission deserves attention. Therefore, I begin by offering a brief argument for the systematic use of theory to address this policy issue. I then describe the major tenets of *the Human Capabilities Approach*, before presenting examples of its use in the higher education literature and justifying its choice as a frame of analysis. Subsequently, I move on to discuss the usefulness of the Human Capabilities Approach in terms of its potential to adjudicate justice/equity considerations and its

generative potential¹¹, both of which, in my view, should be central components of any discussion about work-family policy.

Why does Theory Matter?

St. John has consistently asserted that the disintegration of consensus in the policy arena during the 1980s led to the rationalization of various policy paradigms, each of which are increasingly characterized by ideological extremes (St. John, 2004a, 2004b; St. John & Elliott, 1994; St. John & Parsons, 2004). As described in a previous paper and referenced above, much of the literature about work-family policy at institutions of higher education emerges from one of two inter-related advocacy positions: work-family balance and gender equity (Hollenshead, Sullivan, Smith, August, & Hamilton, 2005). While neither of these positions could be described as *ideological extremes*, each contains distinct assumptions, has differing intended outcomes, and carries weight with different constituencies within the higher education community. Moreover, each of these positions demands a consideration of justice: both justice in the workplace and justice in the home. A third position, one that forefronts the importance of market forces in the competition for an academic labor force, is increasingly used by colleges and universities that are implementing new types of work-family policies, such as dual-career hiring programs for faculty and their partners. This instrumental approach does

¹¹"We must inquire not only into the kinds of cultural patterns served or discredited by given theoretical positions, but also into the potential for theories to offer new alternatives and options to the culture, both organizational and otherwise" (Gergen, 2000, p. 530). Generative potential is an important consideration, particularly in the field of higher education, where the traditional emphasis has been on the applicability of theory to the everyday function of colleges and universities.

not emerge from any moral or ideological frame, but nonetheless carries its own distinct assumptions and intended outcomes.¹²

St. John and Parsons argue that theory can provide a common framework for analysis within which the values of different ideologies can be engaged and debated (St. John & Parsons, 2004). They posit that theory enables institutional leaders operating in highly politicized environments the opportunity to influence policy proactively, and contend that it offers the advantage of a critical stance with which to test notions of truth and objectivity (St. John & Parsons, 2004). Finally, Rawls' defense of theory (both ideal and less than ideal) seems particularly apt here:

We focus on ideal theory because the current conflict in democratic thought is in good part a conflict about what conception of justice is most appropriate for a democratic society under reasonably favorable conditions... Nevertheless, the ideal of a well-ordered society should also provide some guidance in thinking about less than ideal theory, and so about difficult cases of how to deal with existing injustices. It should also help to clarify the goal of reform and to identify which wrongs are more grievous and hence more urgent to correct. (Rawls, 2001, p. 13)

The Capabilities Approach

At the turn of the millennium, Martha Nussbaum, a professor of Law and Ethics at the University of Chicago, published a book proposing a new philosophical treatment of justice (Nussbaum, 2000). The *Human Capabilities Approach* offers a feminist and universalist conception of justice. In part, Nussbaum attributes her work with a

¹² It may be that the movement away from advocacy-based arguments based on moral frames and towards a more instrumental approach is a reaction to the entrenched ideological divisions of the 1990s. This question, however, lies beyond of this paper. In searching for applicable theories later in this paper, I have also chosen to eschew the equity-efficiency debate.¹² I justify this decision by noting that each of the theories I examine are normative, rather than positive, in nature. By this I simply mean that each is imbued with concern about what *ought* to be, rather than what *is*.

subsidiary of the United Nations, the World Institute for Development Economics Research (WIDER), as the inspiration for the treatise. By using Indian women as the case around which to build her argument, Nussbaum grounds her explication of the *Human Capabilities Approach* in the nitty-gritty of human experience. In this sense, her work moves beyond Rawls' in identifying and articulating the specific goals of reform. Some scholars would, therefore, label this a *substantive*, rather than *formal* theory of well-being (DesJardins, 2003; Nussbaum, 2000).

The book, *Women and Human Development*, begins with a strong critique of traditional economic and philosophical approaches to quality of life assessment. First, Nussbaum notes that aggregate measures, such as GNP, occlude the consideration of human goods that are not always well correlated with wealth, such as the quality of race and gender relations (Nussbaum, 2000). Moreover, she argues that aggregate measures do not provide adequate data for normative assessment because they fail to delineate the top and bottom of the scale onto which people fall.¹³ Secondly, Nussbaum contends that the trade-offs between various basic goods encouraged by the utilitarian framework (e.g. religious versus political liberties) serve to put the disadvantaged at further disadvantage. Of particular importance here, is Nussbaum's critique of Rawls' *Theory of Justice* for overlooking the fact that individuals vary greatly, both in terms of their need for resources and their ability to put resources to use (Nussbaum, 2000, 2001). Ultimately, then, her critique of both utilitarian and resource-based approaches

¹³ Nussbaum faults Becker's satisfaction-based approach for similar reasons, noting that while this approach is useful in adding households a unit of measurement, it fails to account for skewed distributions *within* households (2000).

is that they fail to “sufficiently respect the struggle of each and every individual for flourishing” (Nussbaum, 2000, p. 79).

This critique is not unique to Nussbaum; using the same line of argument, another philosopher and capabilities theorist takes pains to explain what she views as a major shortcoming of the resourcist approach:

The fundamental difference between capability theorists and resource theorists lies... in the degree to which their principles of justice are sensitive to internal individual differences. Resourcism calls on the basic structure to provide, to each person, access to a standardized package of resources that an individual is expected to need in order to achieve relevant functionings. By contrast, capabilities theorists insist that the basic structure should provide, to each person, access to a package of resources adjusted to that person's individual ability to convert resources into relevant functionings. The hallmark of the capabilities approach is its sensitivity to variations in the abilities of individuals to convert resources into functionings. Thus, the fundamental question that divides resourcist from capabilities theories is whether a theory of justice ought to be sensitive to such variations. (Anderson, 2010, p. 87)

Nussbaum seeks to remedy this defect and the defects described above by positing a capabilities-based approach pioneered by herself and economist Amartya Sen. *Human Capabilities Theory* broadens the normative notion of satisfaction to include the opportunities and liberties that an individual possesses and ways in which these resources allow, or inhibit, a person from functioning fully. Despite using the nomenclature of *capabilities* Nussbaum stresses the distinction between *functioning* and *capability*, stipulating that a philosophical account should “preserve liberties and opportunities for each and every person, taken one by one, respecting each of them as an end, rather than simply as the agent or supporter of the ends of others” (Nussbaum, 2000). Implicit in this statement and directly articulated by Nussbaum elsewhere, is the

critique of Rawls' *Difference Principle*. Two clear distinctions separate Nussbaum's theory from that of mainstream development economics. First, she specifically enumerates ten "central capabilities," which are used to measure quality of life in certain core areas of human functioning. Second, she argues that political systems must deliver a certain basic level, or *threshold*, of each capability to each of its citizens. In this manner, as well as addressing concerns about the individual, she defines unjust situations as those in which people systematically fall below the established threshold in one or more of the core areas. Taking an unusual stance as a feminist, Nussbaum posits her theory as a *universal* standard with which to assess fairness/justice.¹⁴ She writes:

Thinking about the defects of the utilitarian approach to development pushes us, then, in the direction of a substantive account of certain central abilities and opportunities, as the relevant space within which to make comparisons of quality of life across societies, and as the relevant benchmark to use in asking what a given society has or has not done for its citizens. (Nussbaum, 2000, p. 63)

The ten **Central Human Functional Capabilities**, as identified by Nussbaum and articulated as minimum thresholds, follow below. Nussbaum is careful to frame the list as one of separate components, distinct in quality and irreducible in number.

¹⁴ Some feminist theorists deride the possibility that there are cross-cultural norms of justice that can be particularized to local circumstances, beliefs and preferences without becoming susceptible to paternalism or imperialism. Based on her work with the United Nations, however, Nussbaum argues that "An international feminism that is going to have any bite quickly gets involved in making normative recommendations that cross boundaries of culture, nation, religion, and class. It will therefore need to find descriptive and normative concepts adequate to that task. I shall argue that certain universal norms of human capability should be central for political purposes in thinking about basic political principles that can provide the underpinning for a set of constitutional guarantees in all nations. I shall also argue that these norms are legitimately used in making comparisons across nations asking how well they are doing relative to one another in promoting human quality of life" (2000, p. 35). The interested reader can explore this topic further in a journal article that Nussbaum wrote for the *International Labour Review* (Nussbaum, 1999).

Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

Bodily Integrity. Being able to move freely from place to place; having one's bodily boundaries treated as sovereign, i.e. being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to search for the ultimate meaning of life in one's own way. Being able to have pleasurable experiences, and to avoid non-necessary pain.

Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude and justified anger. Not having one's emotional development blighted by overwhelming fear and anxiety, or by traumatic events of

abuse or neglect. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience.)

Affiliation. A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.

Play. Being able to laugh, to play, to enjoy recreational activities.

Control over One's Environment. A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation;

protections of free speech and association. **B. Material.** Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. (Nussbaum, 2000, p. 78)

In distinguishing between the *Capabilities Approach* and Rawls' *Theory of Justice*, it is important to note that the former includes some of the “natural goods” such as life or bodily health that Rawls treated as given or unchangeable. This serves as a good example of the difference between capabilities theory (e.g. Nussbaum) and resourcist theory (e.g. Rawls). Capabilities theory extends the conception of justice to *ensuring* that each individual has the resources necessary to enjoy good health, while resourcist theory *assumes* good health as a necessary prerequisite for full participation in society.

In the course of the argument, Nussbaum also addresses a critical dialectic among feminists, which has to do with the basic goals of feminist philosophy: the tension between employment-related capabilities and sex-related capabilities. Nussbaum seeks to build common ground between these two diametrically opposed camps. She is adamant that both sex-related functioning (such as bodily integrity and reproduction) and employment-related functioning are essential human capabilities that should not be abridged; and therefore that common ground can be found. I return to this salient point later in the chapter under my discussion of the competing models of work-flexible policy.

In order to contextualize Nussbaum's work within the broader philosophical debate about different theories of distributive justice, it is useful to examine the criteria philosophers use to judge the strength or adequacy of a theory. According to Anderson, theories of distributive justice must articulate both a metric that characterizes the *type of good to be distributed*, and a rule that specifies *how the good should be distributed*. She divides possible metrics into two categories: those which are subjective and measure justice in terms of the evaluative states of individuals (such as happiness or preference), and those that are objective and measure justice in terms of the states of individuals or their possessions, such as resources or functionings (2010). Both capabilities theorists and resource theorist agree that an objective metric is superior to a subjective metric.

In Anderson's estimation, there are three reasons for preferring the objective metric. First, people adapt to deprivation, meaning that those who have given up on larger ambition in order to survive, or who feel that they are not entitled to complain are disserved by a metric defined in terms of satisfaction or preference (Anderson, 2010). Second, the publicity condition requires that an acceptable principle of public justice be a matter of common knowledge. The impossibility of knowing whether or not subjective metrics have been satisfied further underscores the disadvantage of this type of metric (Anderson, 2010). Third, and most importantly, in a just society the basic structure that determines the terms of cooperation urges the choice of an objective metric. To elucidate this last point, Anderson writes:

Justice is fundamentally about second-person normative claims: claims that morally considerable persons can make to others, holding them to

account for their conduct toward others and its consequences for others. Justice embodies demands of particular persons that can, by right, be exacted from others... What do we have standing to hold one another to account for, in ways that can justify the imposition of coercive rules of justice? Rawls' elegant answer still stands today: we are jointly responsible to one another for the kind of society we have made—that is for the basic structure of society that defines the terms of cooperation. (2010, p. 86)

Anderson notes that capability theorists disagree with resource theorists about how objective needs should be defined. But then she continues:

they agree with Rawls on the more basic point, that citizens' needs are to be defined objectively, in virtue of a political conception of justice that takes the basic structure of society, not states of nature as such or subjective valuations, as that for which citizens are jointly responsible. Thus, democratic equality claims that, in the realm of domestic justice, what citizens owe one another are the capabilities they need to function as equals in the system of cooperation. (Anderson, p. 86)

Thus, human capabilities theory serves as an appropriate analytic with which to contemplate issues raised by public and institutional policy regulating work-family balance.

Use of the Capabilities Approach in Higher Education Literature

Consistent with his earlier use of Critical Theory and Rawlsian philosophy as tools with which to interrogate and reframe applied policy research, St. John incorporates the Capabilities Approach into a framework with which to hold educational systems to public accountability. He writes:

Education improvement and attainment are appropriately viewed in their social and economic contexts, with an emphasis on fair and just access to education and to a livelihood in the emergent global economy... [therefore,] it is appropriate to view the problem of standards for public accountability from the just society's framework. (2006, p. 422)

Acknowledging that mandatory K-12 education has evolved as a standard in the U.S., St. John argues for the establishment of a new standard, or “threshold,” that would provide universal postsecondary access based on citizens’ need to support their families (2006). To that end, he proposes three standards of justice in educational opportunity:

- 1) The Basic Capabilities Standard: At each level of education—elementary school, middle school, high school, and college—equally prepared students should have equal access to quality educational opportunities.
- 2) The Equity Standard: Public policies that promote and ensure access to basic and advanced education should deviate from equal treatment only when family and life circumstances create unfair disadvantages.
- 3) The Public Finance Standard: Public finance strategies should use tax dollars to meet the basic education standard, emphasizing equalizing opportunity as a first priority when inequalities are evident, given availability of tax revenue and public willingness for just taxation. (St. John, 2006, p. 423)

Drawing his argument from the arguments advanced by Nussbaum and Sen, St. John posits three specific *thresholds* for public education (St. John, 2006). Each of these standards confronts the issue of increasing privatization in different ways. The first acknowledges the role of choice schemes (e.g. vouchers) in expanding educational opportunity at elementary and secondary levels, and the complications that arise from the shift toward privatization in higher education (St. John, 2006). The second cites evidence that privatization has created new inequalities in higher education, and that public policy has had “negative, unintended effects on equity outcomes” (St. John, 2006). (Of note is the fact that in the articulation of the second statement, St. John follows Rawls and Nussbaum by including the family as a basic societal institution which is subject to public policy.) In the third, he argues that cost-sharing strategies

disadvantage low-income students, especially at the postsecondary level.

Consequently, he advances the argument that public tuition should be viewed as a “targeted form of taxation.”

Changing Conceptions of Family

I briefly discussed Nussbaum's dissatisfaction with Becker's model of the household above. While she finds Becker's approach useful in adding households as a unit of analysis, it fails to account for skewed distributions *within* households (Nussbaum, 2000). However, it is also important that she challenges Rawls' conception of family for similar reasons.

Nussbaum is not alone in identifying and focusing on the importance of family structure. Dolgin (1997) developed two competing models of the family, derived from a series of legal cases and doctrines tracing back into the 19th c. The first, a traditional model, construes families as hierarchical, holistic and generally immune to individual manipulations of choice.¹⁵ The second, a modern model, views families as egalitarian, a "collection of autonomous individuals, connected only insofar, and only for so long, as the individuals involved chose to be connected" (Dolgin, 1997, p. 248). Dolgin bases her analysis on the evolution of the role of reproduction in legal doctrine—from the traditional view that reproduction was unalterably linked to biological processes, to the modern view that it is something which can be controlled through negotiation and bargaining. The importance of this text to this analysis is its confirmation of the

¹⁵ The term *hierarchical*, in this context, refers to the dominance of parents over children, and men over women, respectively, in the traditional family unit. Because there was an acknowledged "head" of the family, the family could be perceived to act as a single entity, or in a *holistic* manner (Dolgin, 1997).

changing conception of the family, a premise which finds resonance with other scholars (Estlund & Nussbaum, 1997; Frank, 1999; St. John, 2006).

An example can be used to illustrate the disjuncture between traditional conceptions of family and the emerging, more contemporary conception of family. Federal rules define a "qualified family member" as any one of the following individuals: the legally recognized spouse of the employee, a biological, adopted, or foster child, stepchild, legal ward or any person under the age of 18 for whom the employee assumes day-to-day financial and care-giving responsibilities; a child 18 years of age or older who is incapable of self-care due to physical or mental disability; a biological parent or other person who had day-to-day responsibilities to care for and financially support the employee when the employee was a child. It should be noted that in spite of the increasing liberalization of state policies on various family-related issues, parents-in-law, significant others and domestic partners are not considered "qualified family members" under the FMLA rules (U.S. Department of Labor, 2005). Employers, however, are free to include additional categories of individuals under the definition, if they choose to (Center for the Education of Women, 2003).

Applicability of Theory to Work-Family Policies

In this section, I briefly review three theories and assess each for its applicability to the topic of work-family policy at institutions of higher education.¹⁶ Critical theory has played an important role in the study of education. It has enabled education scholars to

¹⁶ For the Comprehensive Qualifying Exam I wrote a more lengthy section exploring the potential uses of critical theory and Rawls' Theory of Justice in relation to work-flexible policy. This could be added here (if necessary) to flesh out the argument.

examine our increasingly heterogeneous society by focusing on the contradictions and differences—social, ideological, cultural—among students and teachers, in particular. The postmodern understanding of language, central to critical theory, has not only stimulated nuanced and revealing studies of the ways that different groups are represented, but has encouraged a culture which values dialogue around and across differences of gender, class, ethnicity and race. However, the same emancipatory element that makes critical theory attractive to social activists also associates its use with disenfranchised groups of people (Milam, 1993). Particularly because the topic of work-family policy has been so frequently framed as a women's issue, I believe that it is crucial to reframe the issue in a more inclusive way. In my view, researching work-family policy in terms of its impact on both men and women not only lends more credibility to the project, but is the most effective way to address long-term issues of equity and justice. Moreover, the relativist epistemological stance which characterizes critical theory makes its practical use difficult:

As educators [or policy researchers] we are always and necessarily moral actors, at whatever level we teach [or inquire] we are confronted daily with myriad choices that call for the development of reasons to support one course of action over another, the result of which may have profound long-lasting consequences. A postmodern orientation seems ill-equipped to handle these deliberative failures of educational life (St. John & Elliott, 1994).

If Critical Theory is too concerned with the disenfranchised, then a distributive theory of justice, which justifies an inequitable distribution of social and economic resources in society, has the advantage of having, at its core, the welfare of the *whole*

society in mind.¹⁷ Moreover, it incorporates (albeit greatly expands upon) the economic rationales upon which most modern policy studies depend (St. John & Elliott, 1994), giving it credibility and accessibility to other researchers, scholars and practitioners. Let's briefly review Rawls' Theory of Justice. In Principle #1, Rawls defends the basic liberties of all individuals—but he limits these liberties exclusively to the right to vote, the right to run for office, the right to freedom of thought, the right to freedom of the person, the right to hold personal property and the right to freedom from arbitrary arrest and seizure. These are all important, and irrefutable democratic principles, but Rawlsian philosophy fails to accommodate the topic of work-family policy. While Rawls identifies the family as one of the central institutions of society, he simultaneously defends the distinction between private and public life. Rawls' equivocation between holding the family unit accountable to distributive justice and the importance he attributes to separating the private and public spheres means that whatever fortune or misfortune befalls individuals within the family is beyond the reach of the Theory of Justice.

However, the family, family structures and the division of labor within the family have all been amply demonstrated to affect both men and women in the workplace. Furthermore, current scholarship in the social sciences demonstrates that the structure of the family has changed. Thus, the application of Rawlsian philosophy to a topic such as work-family policy, which is inherently concerned with the family and private sphere

¹⁷ In Rawls' own words: "In justice as fairness society is interpreted as a cooperative venture for mutual advantage" (1971, p. 84).

divisions of labor, seems inappropriate. No matter how apt Rawls' treatment of the family in 1971, the application of such theory now would be anachronistic.

The impenetrability of the family to the Theory of Justice is thus a critical shortcoming of Rawlsian philosophy: namely, the restriction of basic liberties to the six enumerated above.¹⁸ An example might be helpful. If the family unit, but not the individuals within it, are not accountable to society as a whole, then what transpires within it may not be regulated by society. Thus, any infringement of individual rights or liberties not explicitly listed above would have to be permitted. Obvious examples include bodily integrity (e.g. domestic violence) and the inequitable distribution of resources, including access to education within the home. In Afghanistan, for example, access to educational resources for a girl child would be withheld while her brothers were sent to school. Under the Theory of Justice, this practice would be permissible, because the decision is made within the family. Susan Moller Okin and Nussbaum both critique Rawls on this point: not because he disputes that the family is an important social institution, but because he fails to make the theory of justice applicable to all of its members.

If, after consideration, we reject the use of Critical Theory as well as the Theory of Justice with which to frame issues of tenure-track faculty and work-family policy, we are left to ask whether or not the Capabilities Approach is adequate to the task. I suggest that it is for the following reasons:

¹⁸ Rawls demonstrates ambiguity over another basic human good: the self-actualization derived from "a skillful and devoted exercise of social duties" (Rawls, 2001). He utilizes this good to justify the principle of open positions, but does not secure it as a right under the first principle of justice.

1. Following in the philosophical footsteps of the Theory of Justice, and enhanced by the work of Nobel economist Amartya Sen, the Capabilities Approach incorporates a sophisticated, contemporary understanding of market forces. St. John reminds us that "Education improvement and attainment are appropriately viewed in their social and economic contexts, with an emphasis on fair and just access to education and to a livelihood in the emergent global economy" (St. John, 2006, p. 422).
2. Unlike Rawlsian philosophy, the Capabilities Approach recognizes the changing structure of the family (see earlier discussion of Dolgin's work) and the negative implications for justice/equity inherent in treating it as autonomous.
3. The Capabilities Approach recognizes that different groups, and different individuals, have different abilities to utilize resources. Thus, at the heart of Nussbaum's philosophy is a deep regard for the welfare of disenfranchised groups. Since literature in the field has amply documented the squeeze female academics face between work and home, it seems only responsible to draw upon a theory that acknowledges and seeks to address equity issues related to both women and men.
4. In identifying 10 Central Human Functional Capabilities, Nussbaum augments the basic list of liberties provided by Rawls. Let's refer back to Rawls' discussion of open positions for a moment. It is clear that Rawls has tremendous respect for the ability of individuals to achieve self-actualization through the exercise of social (work-related) duties. But, as noted earlier, he does not protect this

process of self-actualization for everyone. Nussbaum, on the other hand, does just that by stipulating Functional Capability #4: "Being able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one's own choice... Being able to search for the ultimate meaning of life in one's own way" (Nussbaum, 2000).

Public and Institutional Policy: Differing Thresholds of Human Capability

Following Nussbaum's example, let's examine a sampling of the functional thresholds have been established to regulate work-family balance in the U.S. In the box on the next page, I present an overview of the FMLA. While not the only piece of federal legislation that affects work-family balance for American employees, (faculty and non-faculty alike), it is without doubt the most significant.¹⁹ For this reason, it is appropriate to consider it a threshold, in the same way that Nussbaum talks about the list of functional capabilities.

¹⁹ Another piece of legislation, the Pregnancy Discrimination Act of 1978 (PDA) could also be mentioned in this context. The PDA requires that employers provide women who are affected by pregnancy, childbirth or related conditions benefits that are at least equivalent to those of employees who are disabled, or otherwise unable to work (The Center for the Education of Women, 2005).

The Family and Medical Leave Act of 1993 (FMLA)

The FMLA was the first piece of federal legislation enacted to help workers balance work with family responsibility. It guarantees covered employees (those at workplaces of at least 50 employees within a 75 mile radius who have worked for 1250 hours and at least a year) 12 weeks of unpaid leave annually for childbirth, care giving or medical reasons. Approximately 4 million working men and women annually have used the leave to care for their family members (Lenhoff, 2001). The

five intended purposes of the FMLA are listed below:

- 1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
- 2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
- 3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
- 4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential of employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
- 5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause. (United States Department of Labor [USDOL], p. 2)

The question is, then, what sort of threshold does the FMLA provide? The first notable thing about it is that, as federal legislation, it provides an entitlement to a broad universe of workers. The entitlement consists of a 12 week, unpaid leave to attend to

one's own serious health matter, to attend to a birth or adoption in the family, or to attend to the health-related concern of a family member. Let us begin by observing two things: the FMLA is *not* universal and it is *unpaid*. Both of these facts indicate awareness on the part of the state of the burden that an employee's absence can place on an employer. First, we note that the state restricts the eligibility of employees to those who work for organizations which employ 50 or more workers, thus ensuring that an organization has a large enough revenue stream and enough manpower to sustain the absence of one or two employees for a time. Second, we note that though the employer may have indirect costs associated with the loss of the employee for 12 weeks, it bears no direct cost (including salary). The intended effect of the policy is clear; to provide employees time off to deal with childbirth or illness at little or no expense to employers.²⁰ The minimum is this: most employees shall have time off to attend to reproductive or health-related matters which directly affect either themselves, or member of their immediate family (defined as a traditional, nuclear family) without losing their jobs. The threshold thus established is that care giving related to one's own serious health condition that of an infant or another family member is adequate reason to be exempted from work for a time.

Let us now take a look at how one institutional policy defines a different threshold of human functioning capability. The Massachusetts Institute of Technology

²⁰ Of note here is literature which documents the unintended effects of this policy. Han and Waldfogel found that when state and federal leave allocations were considered, increases over time in unpaid leave failed to result in more leave-taking by employees (2003). This finding suggests that the cost-sharing burden carried by employees prevents full usage of such policies, an observation that is confirmed by another study emerging from the nonprofit sector (Holcomb, 2001).

(MIT) has instituted a policy that *triggers the extension of* the tenure clock for any faculty member who bears a child during her tenure probationary period:

In recognition of the effects that pregnancy and childbirth can have on a woman's ability to perform all the tasks necessary and expected to achieve tenure, a woman who bears one or more children during her tenure probationary period will have that period extended by one year. As in all tenure cases, a tenure review can take place prior to the end of the probationary period and that possibility should be assessed annually. (Massachusetts Institute of Technology, n.d.)

The value of an entitlement like MIT's, is that it makes the policy the norm for all women—thus diminishing the fear a female faculty member might have that, in requesting to use the policy, she appears less successful, capable or hardworking than other women who bear children and do not request an extension of the tenure probationary period. Also of interest is that this policy functions as an entitlement only for women who are birth mothers. Fathers, adoptive mothers, etc., must *apply* for an extension of the tenure clock. This policy then intends to support both a woman's biological role as well as her ability to have an academic career.

We can see that MIT's policy establishes a much higher standard of human functioning capability than the FMLA does. If we were to map it against Nussbaum's list of functional capabilities, we would see that the MIT policy meets the thresholds of capabilities # 2, 4 and 10 simultaneously, clearly establishing a higher threshold than the List of Functional Capabilities does. This is as it should be. Nussbaum reminds us:

A list of the central capabilities is not a complete theory of justice. Such a list gives us the basis for determining a decent social minimum in a variety of areas. I argue that the structure of social and political institutions should be chosen, at least in part, with a

view to promoting at least a threshold level of these human capabilities. But the provision of a threshold level of capability, exigent though that goal is, may not suffice for justice, as I shall elaborate further later, discussing the relationship between the social minimum and our interest in equality. (2000, p. 75)

An examination of overlapping federal, state and institutional policies on work-family balance reveals that institutional policies are often ahead of the curve with respect to protecting and enhancing an employee's ability to juggle job duties, family responsibilities, health concerns and other work-life considerations (Hollenshead, Sullivan, Smith, August, & Hamilton, 2005)

Using the Human Capabilities Approach to Understand the Possible Effects of Work-Family Policy on Tenure-Track Faculty

Like Rawls, Nussbaum considers free associations, such as universities, to remain outside of the basic structure of society. Instead, I shall follow St. John and argue that universities specifically, and higher education more generally, should be considered a part of the basic structure in the United States (St. John, 2004b). I make this argument for two reasons. First, Nussbaum employs the case of India as a normative baseline for the hierarchical positioning of third world societies in order to support a universal feminist philosophy. Her argument can be understood as a version of feminist standpoint epistemology, employing the stance of a group well outside the dominant power structure in order to clarify and critique the structure itself. Second, she argues that national and local contexts are indispensable in the realization of constitutions and legislations and thereby the rules which govern other types institutions within the

secondary structure of society. Anderson has taken the additional step of identifying the demands of justice that are needed in a democracy. "In my view, the fundamental requirement of democracy is that citizens stand in relations of equality to one another. Citizens have a claim to a capability set sufficient to enable them to function as equals in society (assuming they have the potential to do so)" (2010, p. 83). She enumerates the democratically relevant functionings as "adequate safety, health and nutrition, education, mobility and communication, the ability to interact with others without stigma and to participate in the system of cooperation" (Anderson, 2010, p. 83). What we glean from this is that some demands of justice accrue over and above the basic list compiled by Nussbaum.

Anderson employs sufficientarian principles to specify that all social groups have access to enough primary and secondary education to qualify them to succeed at a four-year residential college with a curriculum demanding enough to prepare them for postgraduate study. However, most higher educationists would agree that it is insufficient to provide sound primary and secondary schooling without also securing *access* to institutions of higher education. Structural inequities continue to make access to college difficult for members of multiply disadvantaged groups. So while I agree wholeheartedly with Anderson's argument for an integrated elite, which is aimed at providing a comprehensive and just solution to the problem of college access, I depart from her on this point. I believe that a sufficiency standard articulating *access* to higher education to be preferable to that which stops at *opportunity* to higher education. If we consider that capabilities theorists define the rule of constrained proceduralism in terms

of opportunities, rather than achieved functionings, it follows that individuals should actually be able to choose whether or not to attend college (Anderson, 2010).²¹

It has also been argued vigorously and persuasively, within the context of the United States, that postsecondary education is the necessary prerequisite to full economic and social participation (St. John, 2006). Social theories of educational and social attainment (St. John & Miron, 2003) and empirical work done on employment patterns reflect this to be true. There is also a substantial literature demonstrating links between exposure diversity and student outcomes. It can then be argued that in the American context, because they are publicly supported, *institutions of higher education are actually part of the basic structure of society*. It therefore follows that the Central Human Functional Capabilities should apply directly to them. It can thus be logically argued, both on the basis of Nussbaum's argument as well as the beneficial material and immaterial outcomes that accrue to citizens through higher education (Gurin, Dey, Hurtado, & Gurin, 2002), that the university is an indispensable part of the basic structure in our society.

In addition to drawing from the higher education literature, support can be derived from the work of at least one other capabilities theorist for the use of this approach to the study of work-family policy within higher education. Anderson has advanced the notion that our social elites (leaders in business, law, education, and politics) should be composed of persons from many different walks of life so that they are responsive to

²¹ Anderson writes: "Constrained proceduralism follows from the fact that capability theorists define the rule in terms of opportunities to achieve valued functionings—i.e., capabilities—rather than in terms of achieved functionings, leaving it up to individuals to choose how to take advantage of the opportunities open to them" (Anderson, 2010, p. 82).

and effectively able to serve the interests of people from all walks of life (Anderson, 2007). Since white men continue to be disproportionately represented among the tenure-track ranks, it is clear that integration of the higher education elite along racial and gender lines has not been achieved. One educationist has observed that "the reality is that perhaps the least successful of all the many diversity initiatives on campuses are those in the area of faculty diversity" (Smith, 2004, p. 9). While the fact women and individuals of color are underrepresented among the professorial elite is incontrovertible, the importance of this issue is often downplayed because of the small numbers of faculty involved. Here, however, I believe Smith's argument that professors serve not only as elites, but as the teachers of *all of society's elites* is an important and salient one. She has argued, very persuasively, that this small group of individuals not only constitutes the tail end of the educational pipeline, but that in an important sense, it also constitutes the *genesis* of the pipeline for doctors, lawyers, politicians, businessmen and academics as well—in short a great number of society's elites. Taken together with Anderson's argument that the 1st hand knowledge held by society's disadvantaged groups is critical to eroding the systematic privilege and cognitive deficits of the advantaged groups (Anderson, 2007), it seems to me all the more critical that elite educators be drawn from multiply advantaged, disadvantaged and segregated populations.

Having established then that the list of Capabilities should apply directly to higher educational institutions, I now turn to the question of applying these principles to the problem at hand. The question is how the emerging phenomena of work-flexible policy

affects university faculty. To that end, I propose the examination of the three policy models articulated below through the lens of the Capabilities Approach. My goal is to begin to construct a theory about the role and potential role of work-flexible policy on faculty in higher education.

Three Models of Work-Flexible Policy

Based on a review of the literature, and on several studies I worked on at the University of Michigan's Center for the Education of Women (Smith & Waltman, 2006), I compiled a typology of work-flexible policies among institutions of higher education. This typology highlights the justice/equity concerns specific to seven different types of work-flexible policy: childbearing leave, parental leave, employment assistance for dual-career couples, dependent care leave, modified duties policy, tenure clock extension and part-time appointments. Each of these justice/equity considerations hinges on the currently inflexible nature of the tenure track within the larger context of changing family formations.

Based on this initial work, I then developed three models which encapsulate the various manifestations of work-flexible policy in higher education.²² I chose tenure clock extension policy as the genesis for these conceptual frameworks, because it is the most prevalent example of work-flexible policy (Sullivan, Hollenshead, & Smith, 2004), as well

²² St. John and Parson provide a challenge to policy researchers which has helped galvanize me in this task: "It is important for policy analysts to think through how research is used to inform the policy discourse. By examining the rationales used to argue for public funding in relation to empirical evidence about the truth of the implied claims, it may be possible to develop better-informed rationales to illuminate the political nature of policy decision. In this way we can move from an abstract use of theory to explain the policy process to a pragmatic use of theory to advocate for better-informed policy choices." (St. John & Parsons, 2004, p. 9)

as one of the first to be adopted and codified at many institutions. More importantly, tenure-clock stop policy speaks directly to the aspect of academic life which makes it unique from other professions (the institution of tenure), and therefore stands as both the ideological and teleological cornerstone of the larger phenomenon of work-flexible policy.

My examination of the rationales under girding tenure clock stop policy reveals the ways in which institutions justify these policies and the implied claims that the various rationalizations carry. After presenting the models, I map each against Capability No. 2 (Bodily Health) to determine whether or not it conforms to the criteria proposed by Nussbaum. This discussion is brief; more work remains to be done in fleshing out the frameworks and in weighing them against the other capabilities on the list.

Gender Equity Model

An early example of a work-flexible policy rationale can be drawn from MIT's tenure clock extension policy. Perhaps because of the institution's scientific and technological bent, MIT was one of the first institutions to explicitly link work-family policy to the representation of female faculty among the tenure-track ranks.²³ Gender-equity models such as this one are characterized by their inclusion of clauses linking sex-related capabilities to employment-related capabilities (e.g. in the case of the University of Michigan women *are not* generally, but pregnant women *are* entitled to the exercise of the policy).

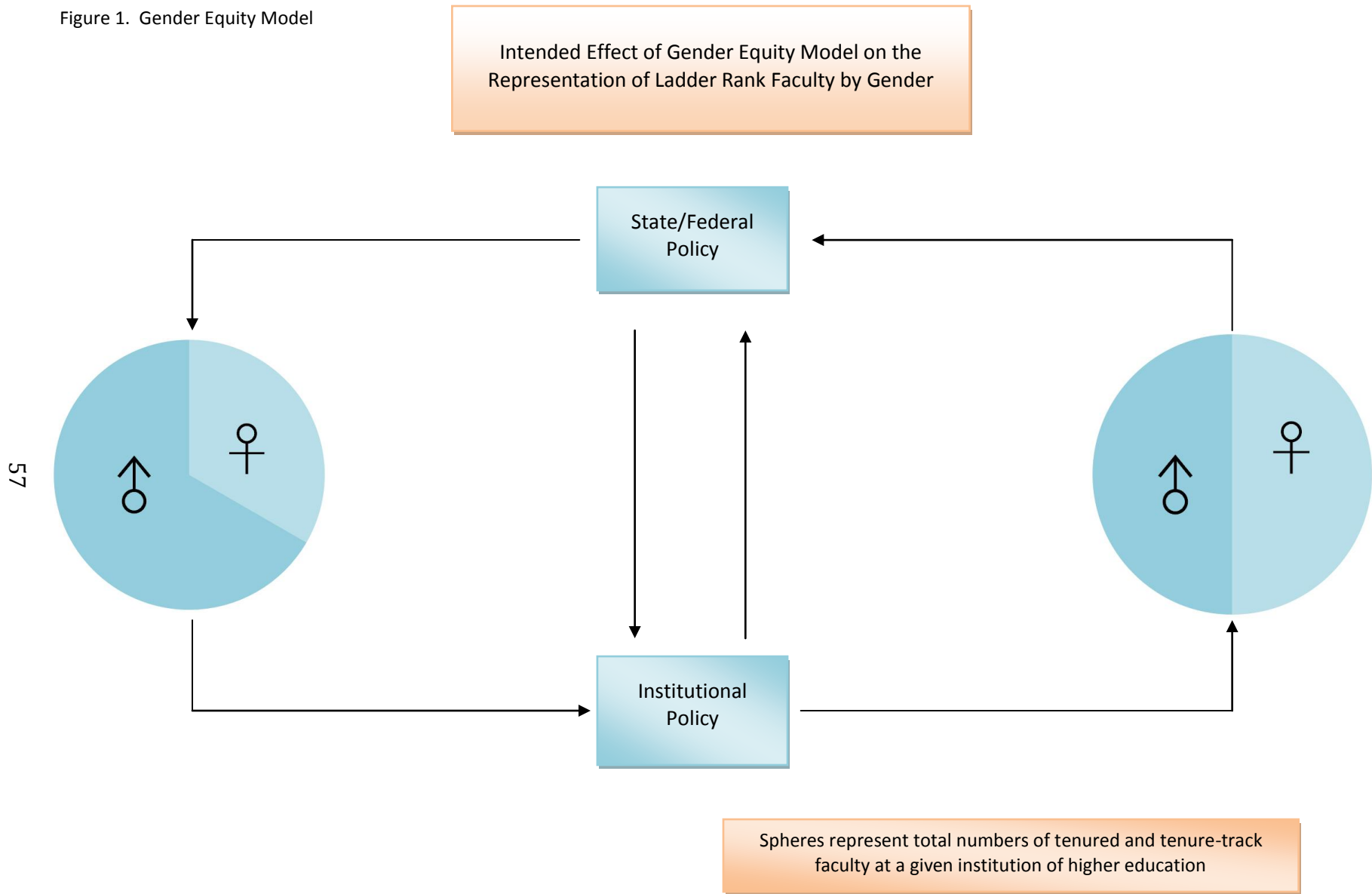
²³ Massachusetts is also a state without any family medical leave laws. Its institutional policy targeting women thereby addresses an issue omitted from the larger public policy context, as well as signaling concern for the gender imbalance among its faculty.

Figure 1 (below) represents the hypothesized relationship between state, federal and institutional policies and the representation of female faculty. The directional arrows between state/federal policy and institutional policy represent the possible evolution (from institution to state to federal) or devolution (from federal to state to institution) of policy. In many cases, however, state policy emerged prior to federal policy, leading to a state to federal to institutional pattern (which is why federal and state legislation is represented in the same box). Also depicted, in spheres at the left and right side of the diagram, is the gendered division of tenured or tenure-track faculty. The hypothesis offered is that shifts in policy at any level which expand work-flexibility for faculty will result in greater percentages of tenured female faculty.

The implied claims of the gender equity model are:

- That the tenure system is built on a masculine norm; it therefore puts women in the situation of having to choose between sex-related capabilities and employment related capabilities.
- That the tenure system is constructed around the notion of a single-earner household. The male earner in this household is expected to have the financial responsibility for, and the domestic support of a nuclear family.
- The recognition of the conflict created by the male-normed structure of the tenure system necessitates that women be accommodated for their sex-related capabilities.

Figure 1. Gender Equity Model



The Work-Family Model

The salient feature of work-family model is that the policy in question is not linked to sex-related capabilities, but available to faculty of either gender. (See Figure 2, below.) In contrast to Massachusetts, Washington is a state with its own family medical leave legislation. In its articulation of the tenure-clock stop policy, the University of Washington exemplifies strong support for faculty who wish to balance work and family.

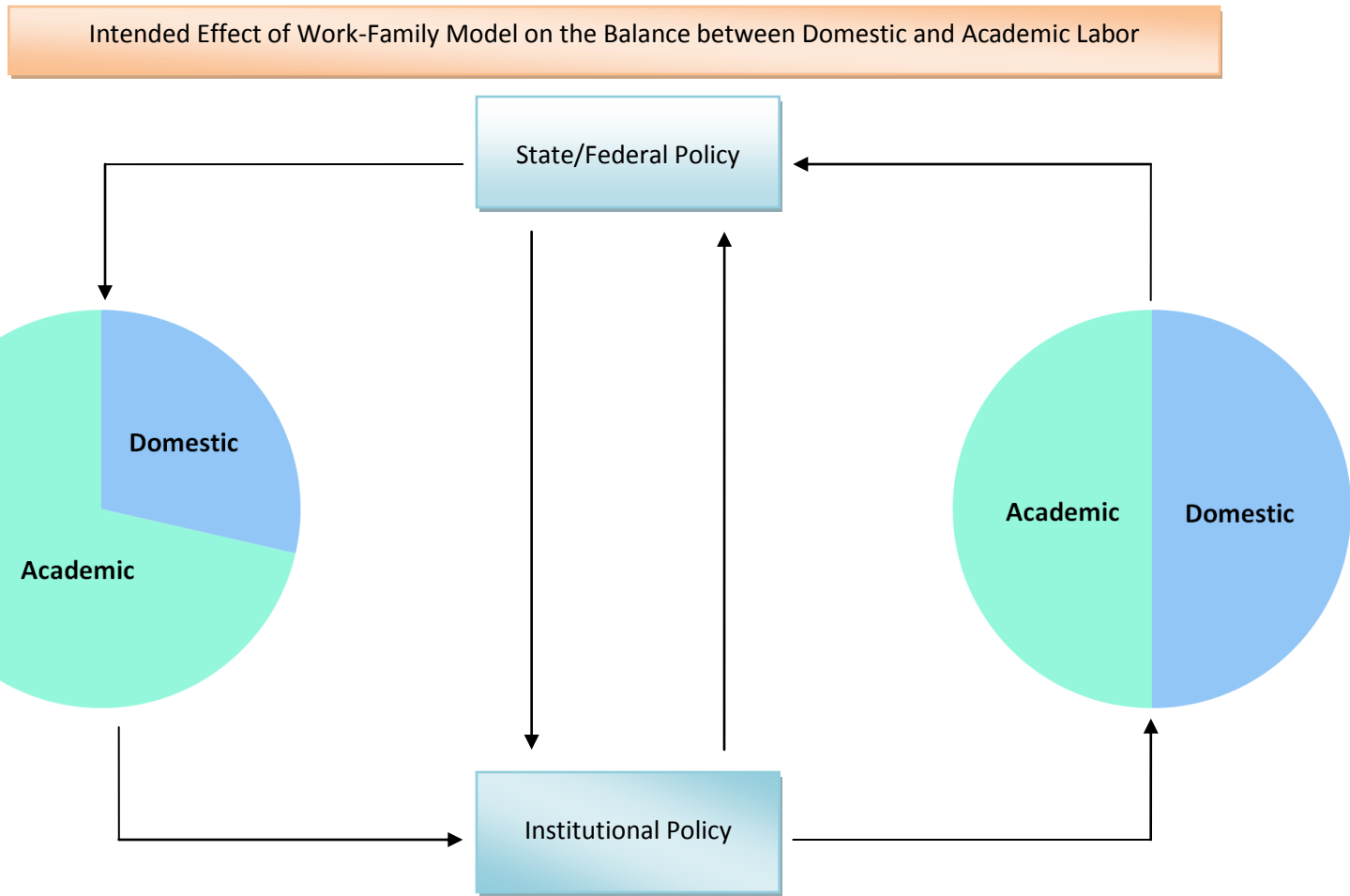
The University recognizes that under special circumstances, such as care for new infants, faculty women and men must devote extraordinary efforts to their family responsibilities which may significantly detract from their research and academic capabilities. Even if the faculty member continues to work full time, efforts normally devoted to scholarship may necessarily be reduced by these new family responsibilities. In recognition of these family obligations, the University has devoted several programs to stop temporarily the tenure clock. ("Faculty medical leave, medical leave and tenure extension", n.d. Tenure Extension, ¶ 1)

The implied claims of the work-family model are:

- That family care is a more important social good than gender equity. (In part, this is a teleological argument; gender equity models were developed early in the movement towards increased work-flexibility and have since largely been replaced by work-family models.)
- It recognizes the changing nature of households. By this I mean the deterioration of the nuclear family, the prevalence of dual earner households and increased incidences of male caregiving.

- Policy initiatives should not interfere or mandate the division of labor between men and women. This is to say that work-family models offer the possibility of gender role changes, but do not mandate them.
- Appropriate balance between academic labor and domestic labor engenders improved morale and increased productivity among faculty.

Figure 2. Work Family Model



The Market Model

In an era of declining public aid, inter-institutional competition for students and faculty takes precedence over other concerns. The market model resembles the work-family model in several ways, but its emphasis is on the strategic goals of the institution, rather than the concerns of individual faculty members. This last example is from California (UC Davis). Note that part of the rationale, as stated below, is to give the institution a competitive edge in retaining and recruiting faculty. (See Figure 3, below.)

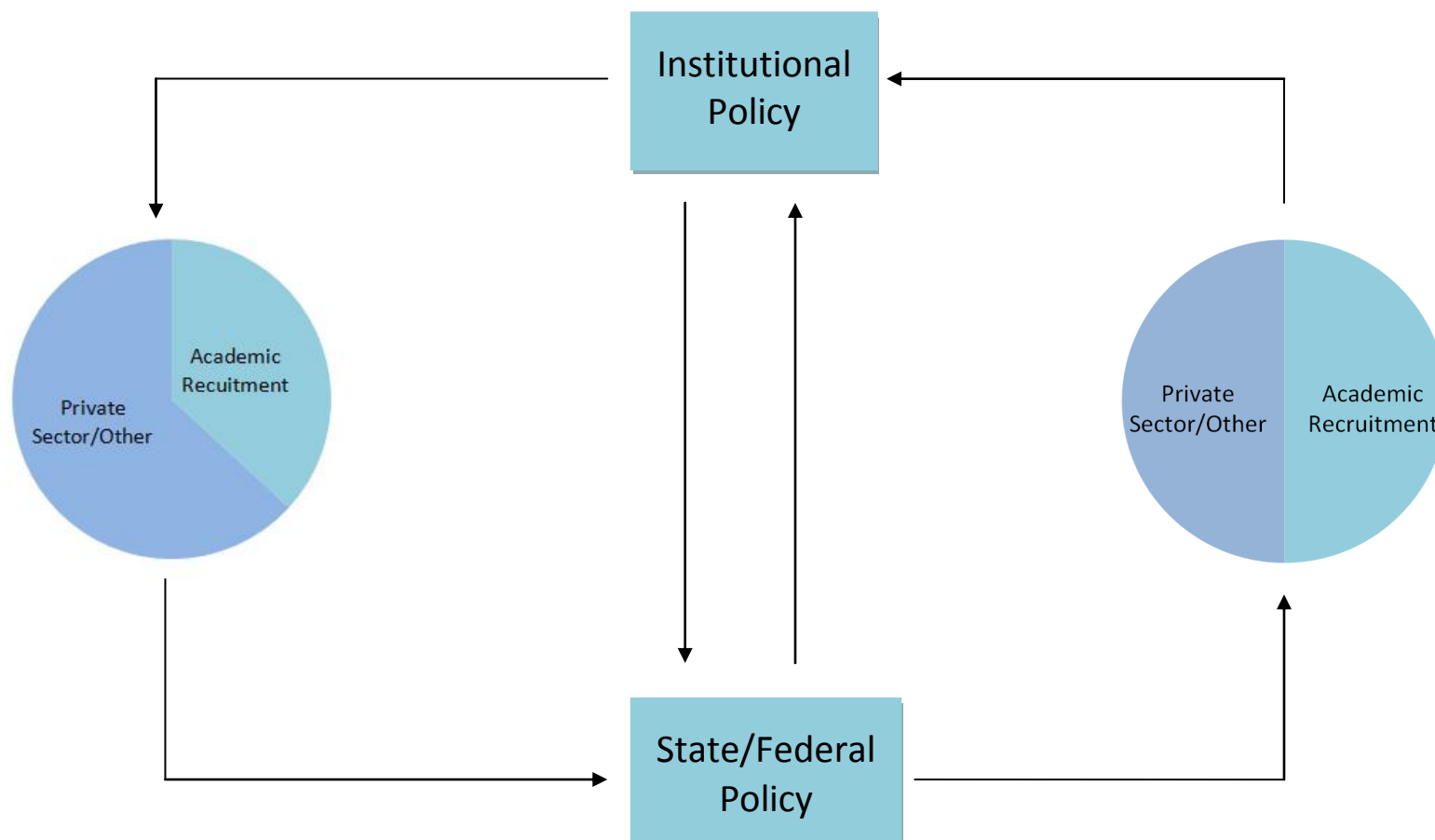
UC Davis recognizes the necessity of supporting faculty in honoring their often-competing commitments to both family and career. To recruit and retain the best faculty, it is imperative that we provide a work environment that provides incentives to our faculty. Provost Virginia Hinshaw's January 2003 Work Life Balance Directive calls for further enhancement of existing system-wide policies. (UC Davis ¶ 1)

The implied claims of this model are:

- The recognition that it is increasingly difficult to attract people into the professoriate due to high work loads and modest salaries, and the recognition that the tenure system must become more flexible if it is to accommodate the increasing need for new and diverse faculty. Therefore, institutions of higher education need a competitive edge in order to compete with other industries.
- Recognition of the changing nature of households. By this I mean the deterioration of the nuclear family, the prevalence of dual earner households and increased incidences of male caregiving.
- The institution itself must assume responsibility for achieving these aims, rather than relying on state or federal policy levers.

Figure 3. Market Model

62



Mapping the Work-Flexible Policy Models to the List of Capabilities

In this section, I use the process of reflexive equilibrium to examine the intended effects of the three models above against the list of Central Human Functional Capabilities. Reflexive equilibrium is a disciplinary exercise in which philosophical principles are weighed against intuitive judgments, and vice-versa; if a principle, or a judgment conflicts with the other, it is adjusted, creating momentary congruency, or equilibrium between the two (Rawls, 1971). By engaging in this process, we can work backwards from the implications of each model to determine whether or not it conforms to the criteria and threshold proposed by Nussbaum.

If the reader concurs, as I have suggested, that the university is a part of the basic structure of American society, then we must ask: whether the subjective process of tenure review forces faculty to choose between sex-related capabilities and employment-related capabilities. (The reader will remember that Nussbaum forbids any notion of a trade-off between the two.) With this in mind, let's examine Capability #2: "Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter" (Nussbaum, 2000, p. 78).

It is clear that as far as university faculty are concerned, at least in this country, that the second portion of this capability, which addresses reproductive health, is what should concern us here. Empirical research indicates that male faculty does not experience any conflict between sex-related capabilities and employment-related capabilities under the current tenure system. In fact, a study at the University of California demonstrated that men are both more likely to have children early in their

careers than women are and more likely to be promoted if they do have children than men who don't (Mason & Goulden, 2002). In light of this data it seems fair to conclude that the demands of the tenure system do not conflict with male reproductive health. On the contrary, research indicates that for women childbearing conflicts with the demands of the tenure probationary period, leading to both late childbearing and low birth rates among faculty women (Thomas, 2004). These data point to the fact that under current structural and cultural conditions, women's sex-related and employment-related capabilities are brought into conflict with one another. Moreover, the competitive disadvantage women face in the professoriate is accentuated by differences in male and female career trajectories. During midlife, when women are most heavily involved at home (between the ages 40-60), male academics are at the peaks of their careers (McCall, Liddell, O'Neil, & Coman, 2000). We can now test each of the proposed models to see if they undermine the reproductive rights of male faculty and if they support the reproductive health of female faculty.

The implied claims of the gender equity model are: 1 & 2) that the tenure system is built on a single-earner, masculine norm which, 3) necessitates that women be accommodated for sex-related capabilities. Since this model directly addresses the difficulties posed by the conflict between sex-related and employment-related capabilities for women faculty, and it in no way abridges the reproductive freedoms of male faculty, it would seem to meet the criteria of Capability #2.

Let's test the implied claims of the Work-Family model next. The implied claims of this model are: 1) that family care is a more important social good than gender

equity, 2) that the nature of families is changing—both in terms of composition and dual-earner status and 3) that gender role/divisions of labor should not be mandated by public or institutional policy. Clearly, the intent of this model is to improve flexibility for employees balancing obligations at home and in the workplace. Moreover, the rapid diffusion of policies derived from these models at the state level indicates a public policy response to historically low birthrates, particularly in urban centers such as Seattle. Unlike policies designed under the gender equity model, which recognize women for their sex-related capabilities, policies designed under the work-family model do not specifically recognize the sex-related capability of either gender. Therefore, if traditional gender roles are followed, policies enacted under these models are more likely to be utilized by women. They do, however, build in flexibility which enables both sexes to take time off for childbirth or to bond with a newly adopted child. In this sense, then, work-family models too work to mitigate tensions between sex-related and employment-related capabilities and the reproductive health of both men and women.

Finally, let's examine the implied claims of the market model. Increasingly, the market model is being used to rationalize the enactment of policies which are very similar to those of the work-family model. However, there are two important distinctions between these models and the former. The first is that the market model assumes that inter-institutional competition (for funding, students or faculty) should arbitrate organizational policy design. Secondly, it assumes that institutions themselves, and increasingly subunits within institutions (see example of UC Davis above), need to be the driving force behind policy implementation. Like policies designed under the

work-family model, policies designed under the market model do not specifically recognize the sex-related capability of either gender. They do, however, build in flexibility which enables both sexes to take time off for childbirth or to bond with a newly adopted child. In this sense, then, market models also work to mitigate tensions between sex-related and employment-related capabilities.

In conclusion, it is fair to conclude that each of the three models—gender equity, work-family and market—support Central Human Capability #2, Bodily Health, as articulated by Nussbaum (2000). It may also be fruitful to examine Capability # 7, Affiliation, and Capability #10, Control over One’s Environment, in a similar manner. I shall leave that task, however, to a future elaboration of this theoretical framework.

Conclusion

In this paper, I begin with an overview of work-flexible policy among institutions of higher education and of the role of theory in research on the topic. This overview includes references to the literature and document analysis of policies at specific institutions. I then identify an omission in the literature: the absence of a coherent analytical framework with which to interrogate the relationship between work-flexible policy and its impact on faculty. In an effort to fill this gap, I explore several theories, and defend the use of the Human Capabilities Approach as the most effective framework for adjudicating the justice/equity considerations raised by work-flexible policy. I then present five new instruments for use by other researchers and theorists interested in the phenomena of work-flexible policy in higher education. These are: a

typology that maps the landscape of work-flexible policy (including the justice/equity considerations entailed by the seven major types of policy), and three conceptual frameworks which illustrate rationales for work-flexible policy and the assumptions that undergird these rationales. Finally, I demonstrate a new manner of testing theoretical constructions about work-flexible policy, by interrogating them with a universalist, and feminist inspired framework from moral philosophy.

Chapter Summary

This chapter introduces the reader to the Human Capabilities Approach. It outlines the basic thrust of this sufficientarian theory of justice and its improvements over competing resourcist conceptions. For several reasons articulated here, the capabilities approach proves to be a powerful tool for analyzing the fairness of higher education work-family policy. In addition, this chapter showcases three models that synthesize the assumptions of work-family policy over a period of three decades and the consequences of these assumptions for individual and organizational actors. In the next chapter, I present the methodological platform for the empirical study of same-sex health benefits. Though same-sex health benefits are not usually labeled as work-family policy, I propose that because they span personal and professional concerns—much as maternity or paternity leaves do—they can appropriately be analyzed in the same manner that the tenure clock stop was in the preceding pages. In chapter eight, therefore, I use the same rubric to assess the normative strength of university adaptations to the repeal of domestic partner benefits in the state of Michigan.

CHAPTER III

THE INSTITUTIONAL LOGICS APPROACH

Literature Review

Institutional theorists sometimes draw distinctions between the “old” institutionalism and the “new” institutionalism, of Selznick, Clark and Gouldner on the one hand and Zucker, Powell and DiMaggio on the other, just as mathematicians spoke of the “New Math” during the 1960s. These categorical references, albeit somewhat reductionist, do allow us to map the big shifts in institutional theory that occurred at the latter end of the 20th c. For the purposes of framing this paper, I rely mainly on sociologically based neoinstitutional theory. Both forms of institutionalism – old and new-- can be understood to assume skepticism towards rational-actor models of organization, to acknowledge that institutionalization constrains rationality, to focus on the interplay between organizations and environments, and to stress the role of culture in shaping organizational realities (DiMaggio & Powell, 1991). New institutionalism, however, is differentiated by its emphasis on nonlocal environments (Scott & Meyer, 1991), the relationship between stability and legitimacy (Zucker, 1983) and a focus on the cultural and cognitive dimensions of institutions and the routine, taken-for-granted aspects of organizational life (Garfinkel, 1967).

Institutional theorists have long recognized that institutions buffer organizations from turbulence and serve as a source of stability (Emery and Trist, 1965 & Terreberry, 1968, as cited in Meyer & Rowan, 1991). E.g., the development of professional associations, trade associations and coalitions standardizes and stabilizes internal and external organizational relationships (Starbuck, 1976). However, one of the central contributions of neoinstitutional theory has been the recognition that institutions achieve legitimacy, in large part, through isomorphism or the process of adapting in similar ways to their environments. Ecologist Amos Hawley first applied the principle of isomorphism to organizations: “Units subjected to the same environmental conditions... acquire a similar form of organization” (as cited in Scott, 2008, p. 152). Recognizing the link between isomorphism and legitimacy means understanding that much of the striking homogeneity between organizations, particularly within delimited organizational fields, accrues from the automatic reproduction of practices and arrangements that constrain individual actors and limit the alternatives they can imagine (Meyer & Rowan, 1977; Powell & Dimaggio, 1991; Scott, 2008; Zucker, 1983).

What are Institutional Logics?

Institutional logics are the axial principles and material practices (Thornton, 2004) or belief systems that predominate in an organizational field (Bastedo, 2009), which influence how organizations develop and change. Thornton writes “institutional logics are axial principles of organization and action based on cultural discourses and material practices prevalent in different institutional or societal sectors” (2004, p. 1).

Institutional logics is a term that was originally introduced by Friedland and Alford to describe the core institutions (political democracy, state bureaucracy and capitalism) that shape the contradictory practices and beliefs endemic to western society (1985). They developed the concept as an alternative to rational choice theory and macro structural perspectives, positing that each of the three institutions has a central logic that guides its organizing principles and provides individuals, groups and organizations with vocabularies of motive and identity (Friedland and Alford, 1991). Friedland and Alford emphasize that organizations, working in and among the core institutions, have multiple, potentially divergent logics available to them:

Some of the most important struggles between groups, organizations and classes are over the appropriate relationships between institutions and by which institutional logic activities are to be regulated and to which categories of persons they apply. Is access to housing and health to be regulated by the market or by the state? Are families, churches or states to control education? Should reproduction be regulated by the state, family or church? (1991, p. 256).

Jackall developed a normative conception of institutional logics in his analysis of corporate ethics conflicts (1988). He defined institutional logics as “the complicated, experientially constructed and thereby contingent set of rules, premiums and sanctions that men and women in particular contexts create and recreate in such a way that their behavior and accompanying perspective are, to some extent regularized and predictable” (Jackall, 1988, p. 112). Thornton and Ocasio built on this early work by Friedland, Alford, and Jackall, to integrate the structural, normative and symbolic dimensions of institutions (2007). All of this work conceives of institutional logics as

embodied in practice, and sustained and reproduced by cultural assumption and political struggle (Thornton & Ocasio, 2007).

There is a lengthy tradition in the new institutional literature of documenting the powerful role that norms, values, and beliefs play in organizational development and change (DiMaggio & Powell, 1991; Friedland & Alford, 1991; Moe, 1987; North, 1986). Higher education scholars have recently begun to analyze the use of institutional logics in efforts to understand the organizational mechanisms that operate in higher education (Bastedo, 2009; Gumport, 2000; Thornton, 2004). Bastedo (2009) uses institutional logics to analyze the policymaking and activism of the Massachusetts Board of Higher Education between 1995 and 1999. He argues that institutional logics (in this case mission differentiation, student opportunity, managerialism and system coordination) can be analyzed both as principles that drive policy actors and as organizational characteristics that emerge to support underlying principles.

One key assumption of the institutional logics approach is that each institutional order in society has both cultural and material characteristics (Friedland & Alford, 1991). “Rather than privileging material or cultural explanations of institutions, an institutional logics perspective recognizes that institutions develop and change as a result of the interplay between both of these forces” (Thornton & Ocasio, 2008, p. 105). Examples of this literature include Selznick’s sociological study of institutional leadership (1957), Jackall’s work on corporate managers (1988), Friedland and Alford’s work on the interrelationships between individuals, organizations and society, and Gumport’s work on academic restructuring (2000). Thus, the institutional logics approach provides a

well-tested methodology for studying both the positive and normative aspects of organizational behavior.

One of the core assumptions of the institutional logics approach, *embedded agency*, was developed by Jackall and Friedland and Alford (1988 and 1991, respectively, as cited in Thornton and Ocasio, 2007). Embedded agency is the supposition that society consists of three levels: individuals, organizations and institutions.²⁴ Conflict and cooperation at all three levels leads to the partial autonomy of the various actors, as well as their interdependence on other actors. The levels are nested, and cross-level effects are critical. Thus, it is necessary to understand the way all the levels work together in order to understand constraints and opportunities for organizational action (Thornton and Ocasio, 2008).

The assumption of embedded agency is particularly appropriate to the issue of same-sex health benefits. The logics that compel policy actors with respect to this topic cannot be rigorously analyzed if they are viewed simply as an outcome of higher education agency; instead, they need to be properly understood in their full context as mechanisms that subsume individual, organizational and institutional actors. In their piece defining institutional logics as a meta-theory and a method of analysis, Thornton and Ocasio stress the importance of identifying the precise level at which logics become institutionalized. The levels they refer to include organizations, markets, industries, inter-organizational networks, geographic communities and organizational fields.

Another example can be taken from Lounsbury and Rao's work on market classification;

²⁴ Friedland and Alford (1991) identify the core institutions of society as the capitalist market, the bureaucratic state, families, democracy and religion.

the authors of this study focus on the role of industry media in shaping the constitution of existing product categories (2004).

An Example of Institutional Logics at Work

Because institutional logics have not been widely used in the higher education literature, it may be useful at this juncture to provide a concrete example from the data. Rather than using the text below to explore findings from the larger study, I introduce it here to demonstrate the manner in which institutional logics are enacted by individuals embedded within organizations. As I proceeded through data collection, it became increasingly clear that the universities in the study had logical, and clearly articulated *pragmatic* rationales for offering same-sex health benefits. It was also apparent that individual faculty and staff had strong feelings about the ethics of continuing to offer the benefits. What remained murky, however, was whether there were any justice-based logics at work at the organizational level. It was a challenge to elicit these considerations from respondents, particularly those with an official responsibility to speak for their institutions (general counsels, provosts, and other executive administrators). These respondents were acutely aware of regulatory and political impediments in Michigan to framing the issue of same-sex benefits as a civil rights issue. At the same time, there was some effort made not to be perceived as homophobic. The passage below highlights this tension.

Interviewer: I hear maybe first and foremost a concern about recruitment and retention. Then I hear some concern about the impacts on families of stripping health benefits away from people who have them. What I don't hear or what I haven't heard from you is a voiced concern about gay civil rights, and I wonder in the course of discussions

here whether that was one of the considerations of the university in terms of responding to this issue, or whether it wasn't. Whether this is sort of a pragmatic decision driven by the change, by the constitutional amendment, or whether there were other considerations involved.

Respondent: I think, as a matter of commitment to members of the NMWU community, and in this case, if we – if you – and I'm going to deal with your question, but I'm going to respond to it in this way:

NMWU did not want to arrive at a decision that would have abandoned members of the campus community. Certainly in this case that particular amendment targeted a certain population that are represented at NMWU.

Whether it is cast in gay rights or these are members of the NMWU community regardless of sexual orientation, there was a commitment grounded in our history that we were not prepared to abandon because a constitutional amendment basically said marriage is defined as between a man and a woman, for any purpose.

So I don't know if that necessarily gets directly at your question. This is a highly –

Interviewer: I guess I was just – I'm just pressing you a little bit for –

Respondent: I know what you're pressing me for.

Interviewer: This is a complicated issue and it's politically fraught, as we both know, and so –

Respondent: It's politically and legally fraught, and institutions, as they approach this, you have to carefully weigh the risks. When you look at this happened by virtue of a majority of people voting, deciding that this was going to happen.

Interviewer: Which is a very strong statement...

Respondent: Mm-hmm. We're a public institution, and so – but it's a public institution that has a set of values and commitments to members of the community who also has to look at the future of our ability to maintain the quality of the institution, which means we've got to have the best minds available to us.

I think the institution doesn't feel like that means we'll limit it to heterosexuals. So for us, I think it was very simply a commitment to our community, and our community includes LGBT community members.

This passage is useful, because it reveals how institutional logics are constructed and the constellation of institution forces at work behind them. The respondent gives a nod to the LGBT community on her campus, but makes it clear that the university's primary concern is related to institutional autonomy and market logics. It is, therefore, the institution of the market that is the prevailing force behind the organizational logic which she articulates. Her reference to the majority vote that ushered in the referendum highlights another institutional force with immense impact on public higher education: that of political democracy. Finally, the statement that the topic is "politically and legally fraught," refers to the power of the state and of the Michigan judiciary. The respondent demonstrates her savvy by navigating between the triad of market, state and political democracy. In other words, the excerpt serves as an excellent example of how institutional logics *outside* higher education impinge on and delineate the terms by which issues are contested and framed *within* higher education.

Conceptual Framework

This paper analyzes the institutional logics that operate at a select number of research universities in the state of Michigan. These universities form an inter-organizational network within a bounded geographical area. Moreover, all of them share a common legislative, political and judicial context. The question of what motivates colleges and universities to take action on the issue of same-sex benefits is

highlighted in Michigan, where a constitutional amendment and subsequent court interpretations demonstrate that constituencies external to higher education seek to prevent gay and lesbian households from receiving health benefits.

There are a multitude of contributing logics on the part of the universities which, nonetheless, offer such benefits. These include-- but are not necessarily limited to-- logics grounded in economic rationality, justice considerations and democratic ideals. Among universities in Michigan—a state which suffers from one of the highest unemployment rates in the nation²⁵—economic rationalization contributes to the maintenance of health benefits for gay and lesbian partners and their families. In fact, multiple studies, across various contexts have demonstrated the prominence of market logics. These include Thornton and Ocasio (1999) on higher education publishing, Ruef (1999) and Scott et al. (2000) on health care, Lounsbury (2002) on financial intermediation, Zajac and Westphal (2004) on equity markets, and Meyer and Hammerschmidt (2004) on public management (as cited in Thornton and Ocasio, 2008). Dobbin and Sutton (1998) note that the tendency of the federal government to defer to market precepts, and its weak ability to enforce compliance, has fostered the legitimacy of the market at the expense of the state. Bastedo (2009) notes that such market-driven logics are often divergent, or inconsistent with the other logics found at work in

²⁵ In October of 2008, Michigan and Rhode Island each had 9.3% unemployment, making them the states with the highest rate of unemployment.

higher education, and that they might therefore provide important information about the underlying assumptions that shape policymaking and its implications for society.²⁶

Research Questions

The goal of this study is to address the following research questions:

1. What institutional logics led the universities in Michigan to enact health benefits for same-sex partners?
2. What hierarchy of organizational goals and objectives is revealed by these logics?
3. What logics inspired Proposition 2?
4. Given the constraints under which they operate, have Michigan's public universities responded fairly to the concerns of their gay employees?

The institutional logics approach, described above, has proven to be a useful framework for studying the regulative, normative and cognitive/cultural aspects of organizational behavior. Institutional logics may be *convergent* or *divergent*, meaning the worldviews and discursive rationales which undergird them coalesce toward a common identifiable outcome or else fracture, leading to multiple outcomes with conflicting objectives (Bastedo, 2009; Thornton & Ocasio, 2007). In this paper, I analyze the institutional logics that operate in higher education as universities adapt to a state policy environment that prohibits the domestic partners and children of faculty and staff from receiving public health benefits.

²⁶ Bastedo follows Gumpert in this regard, who sets up a dichotomy between two competing conceptions or legitimating ideas of public higher education. In one of these views, higher education is an industry or sector of the economy with short term goals related to efficiency and production based on the corporate model. In the other view, higher education is a social institution with a mandate to preserve and generate knowledge, educate citizens in the democratic tradition and otherwise serve the long term public good.

Because gays and lesbians form a group that has been historically discriminated against, and which is currently battling for civil rights across a large spectrum of issues (Asian Pacific American Legal Center, 2009; Herek, Chopp & Strohl, 2007; My Family Law, 2010), the topic of same-sex benefits is fraught with political and ideological tensions. At the same time, access to health benefits raises pragmatic questions related to cost for both individuals and organizations that cannot be ignored (e.g. Schmitt, 2007). Thus, the institutional logics approach, with its assumption of embedded agency (Friedland & Alford, 1991; Jackall, 1988) is particularly appropriate here. Logics that compel decision-making on same-sex benefits must be situated as mechanisms that subsume individuals (decision makers, faculty and staff members), organizations (specific universities or colleges) and institutional actors (the higher education sector, state governments and faith-based organizations); they cannot be rigorously analyzed if they are viewed solely as an outcome of higher education agency.

At the beginning of this project, it was considered that multiple logics grounded in economic rationality or market logics, justice and democratic ideals might influence the treatment of same-sex health benefits. To take a specific example from the organizational literature, multiple studies have demonstrated the prominence of *market logics*. These include Thornton and Ocasio (1999) on higher education publishing, Scott et al. (2000) on health care, Lounsbury (2002) on financial intermediation, Zajac and Westphal (2004) on equity markets, and Meyer and Hammerschmidt (2004) on public management. Bastedo (2009) notes that in higher education, such market-driven logics are often divergent, or inconsistent with the other logics, and that they may, therefore,

provide important information about the underlying assumptions that shape public policy and its implications. The proposition offered here is that market logics may also offer a valuable lens through which to examine how the higher education sector responds to the recruitment and retention challenges raised by the retraction of health benefits. Similarly, other logics, such as those related to the democratic tradition (e.g. valuing diversity and inclusion) may emerge in an examination of how higher education wrestles with this issue.

Chapter Summary

This chapter offers an overview of the institutional logics literature and explains several of the key components of the approach. The concept of embedded agency is useful because it highlights connections between individual actors, the organizations they work in and institutions in the wider environment. Because the provision of same-sex health benefits among public universities spans all six ideal types—religion, the corporation, the state, the market, the family and the professions (Thornton, 2004)—this theoretical construct provides an appropriate and powerful methodological basis for the study.

CHAPTER IV

RESEARCH METHODS

The Case Study Approach

This research project employs a policy case study (Merriam, 1998) to investigate a new work-life policy phenomenon: university responses to a constitutional amendment retracting health benefits for the domestic partners and children of public employees. The methodology derives from the institutional logics perspective, which assumes that local routines aggregate to construct and constrain the choices of organizational actors. (See the preceding chapter for the conceptual framework and a review of the literature.) In order to identify the institutional logics that delineated the direction and scope of the universities' responses, I employed a case study method.

The case study method is ideal in situations in which there are many more variables of interest than data points and the researcher has to rely on multiple sources of evidence (Yin, 1994). In this instance, there are numerous factors at the state and institutional levels (state political climate, institutional culture, the presence or absence of advocacy groups, etc.) that have bearing on how universities respond to the issue. Case studies, or field studies as they are sometimes called, contain thick descriptive data that are useful in illuminating complex processes. Collins and Noblitt (1978) write:

Field studies reveal not static attributes but understanding of humans as they engage in action and interaction within the contexts of situations and settings. Thus inferences concerning human behavior are less abstract than in many quantitative studies, and one can better understand how an intervention may affect behavior in a situation... Field studies are better able to assess social change than more positivistic designs, and change is often what policy is addressing (as cited in Merriam, 1998, p. 42).

In Michigan, as in other states that have passed anti-gay marriage legislation, *change*, or more precisely, the retraction of access to employer-sponsored healthcare is the issue.

Since the aim of this study is twofold, the choice of the case study method is appropriate. The first aim is to understand the institutional logics, or mechanisms, that drive organizational adaptation to Proposition 2 and lead universities to develop same-sex health benefits. The data collection and analysis involved in this type of study is both descriptive and evaluative. It enables us to ask, among other things, what strengths and weaknesses this study demonstrates about the efficacy of the institutional logics approach. The second aim is to assess what we can learn about inter-institutional conflict. What does the institutional logics approach reveal about the normative dimensions of the battle over same-sex partner benefits? How do religious convictions and traditional morals frame the larger conflict between the institution of higher education, religion, and the state? These later assessments require the researcher to bring an understanding of situated ethics to the research. Normative assessments, by definition, require that the researcher search for evidence of *intrinsic* ideals and motivations (Thacher, 2006).

One of the distinctive characteristics of a case study is that it must be bounded. In this instance, the cases are the three universities in the study and their organizational adaptations to Michigan's Proposition 2. The boundaries of the case are distinguished by the direct, or indirect responses of the three universities (specified under the Site Selection section of this proposal) to the challenge of providing health benefits to same-sex partners in the state of Michigan. Only data derived from documents, interviews and data requests at these three universities or related to the provision or retraction of health benefits for same-sex partners is included in the study.

Because institutional logics, as defined in the previous chapter, encompass many aspects of organizational behavior (sensemaking, rationalization, symbolic and material activities to name just a few), it was necessary to think carefully about how to discern and locate institutional logics at the beginning of the project. To that end, I developed the following guidelines:

1. Organizational, rather than individual rationales, reasons and sensemaking would be the primary focus of the analysis. I chose this emphasis because of my interest in why and how the institutions developed same-sex partner benefits. Accordingly, I included counter-discourses and varieties in individual opinion in the analysis only to the extent that they disrupted or dove-tailed with larger patterns of organizational action. (E.g., see discussion of emotional responses to the Passage of Proposition 2 on pp. 191-195).

2. The decision to focus at the organizational level drove both the data collection methods as well as subject recruitment (see pp. 119 and 122, respectively). It meant that I needed access to executive administrators at each of the three universities. It also meant interviewing faculty, since they are the primary strategic targets of the benefits. Staff perspectives were also important for illuminating process details. Taken together, data from these three types of respondents could be triangulated to get a firm grasp on the dominant logics at work on each campus.
3. Last, not least, it was important to look for logics that converged in both rhetoric and action. In other words, if actions differed from rhetorical presentation, then I examined both in order to reconstruct and communicate an accurate understanding of what had transpired. As Keohane and Kratochwil note “institutions do not merely reflect the preferences and power of the units constituting them; the institutions themselves shape those preferences and that power” (1988, p. 382). In some cases, divergence between rhetoric and action signified a type of symbolic, rather than substantive action (e.g. one university’s cap on graduate student health benefits).

Site Selection

To investigate the positive and normative dimensions of the issue of same-sex health benefits, I selected a strategic site: public universities in the state of Michigan. This site was selected because Michigan constitutes an “extreme case” of theoretical interest, due to a constitutional amendment and subsequent court decisions prohibiting the extension of health benefits to the same-sex partners of state employees (Eisenhardt, as cited in Bastedo, 2008; Yin 1994). The Michigan case is the first of its kind, and as such, has already proven to be a harbinger of how public institutions of higher education respond in other states where same-sex benefits are similarly rescinded.²⁷ It is also home to seven research universities,²⁸ a class of institution that tends to be aggressive in faculty recruitment and retention strategies, and progressive with respect to work family policies. The data indicate that research institutions have a significantly higher number of institution-wide, formal work-family policies than do other institutional types (The Center for the Education of Women, 2005). As an example, they are significantly more likely than other types of institutions to have dual-

²⁷ In Kentucky, for example, where a similar ban on same-sex marriage was passed, the University of Kentucky and the University of Louisville both enacted domestic partner benefits. Under appeal, the State Attorney General issued an opinion stating that the benefits programs at both universities violated the constitutional ban on same-sex marriage. Subsequently, however, he issued an opinion suggesting that policies which recognized unmarried partners and their children by some criteria *other* than domestic partnerships would be compliant with the law. Based on this opinion, which directly mirrored the Michigan case, both institutions began offering ODB policies in 2007. (Russell, 2007)

²⁸ The Carnegie classification assigns doctorate-granting institutions to one of three categories based on multiple measures of research activity. The three categories (from most productive to least productive) are: research universities with very high research activity (RU/VH), research universities with high research activity, and doctoral/research universities (Carnegie Foundation for the Advancement of Teaching, n.d.).

career policies because they have more resources and flexibility to create positions than smaller institutions do (Raabe, 1997; Wolf-Wendel, Twombly, & Rice, 2005).

Gaining Access

There were several steps involved in gaining access to each of the research sites and to prospective respondents. Initially, I sought permission from the Institutional Review Board (IRB) at the University of Michigan, Ann Arbor. As part of the IRB application, I wrote an introductory letter explaining the purpose and methodology of the study. Permission was received to begin the study in March of 2009. After approval, the letter was sent to an Associate Provost at each institution, requesting their approval to conduct interviews on campus. I received permission from the first university in May of 2009 and began data collection at that time.

Data Collection

Sample Selection

At the onset of the project, recruitment emails were sent to human resource and provost office administrators at the seven public Doctorate-granting Universities in Michigan. Out of the seven institutions that were approached, three institutions responded positively to requests to participate in the study.

I used a snowball sampling technique to identify possible respondents. Miles and Huberman describe snowball sampling as the process of identifying possible respondents directly from people who "know people who know what cases are

information-rich" (Miles & Huberman, 1994, p. 28). This technique offers a practical way to gain access to subjects through a chain of referral. Snowball sampling is complete when respondents begin to offer repetitive data that does not further the analysis. In order to avoid becoming overly reliant on key respondents, my objective was to obtain six interviews at each institution, comprising between 18-24 interviews in all.

In order to identify possible respondents for the study, I examined various public documents that trace the history of the three universities' reactions to the initial legislation and the court decisions that followed it. I then sought to identify one of each of the following respondents at each institution. First, the Director of Human Resources: second, the Associate Provost with responsibility for faculty hiring and diversity: third, the institution's General Counsel. My aim was to interview the highest ranking person I could in each of these offices, with the understanding the individual fell in the organizational hierarchy, the more their response would constitute a partial or whole institutional perspective. While executive administrators may be well-versed in dodging difficult questions, they often have an understanding of institutional culture and how their unit functions within the larger organization. It was appropriate, therefore, to interview the directors of each of the offices listed above, since their viewpoints were likely to reflect, at least in part, the dominant principles or archetypes that determined the institution's approach to policymaking on the topic of same-sex benefits.

In addition to interviewing executive administrators, I interviewed individuals who advocated for or participated in the development of same-sex health benefit policies. In several cases, these informants provided marginalized viewpoints, as well as a means of triangulation, which I used to balance the institutional perspective offered by executive informants. Interviews with these advocates also gave me a clearer understanding of procedures, norms and values that are enacted at the institution. These respondents who either entered the process of their own volition or due to a professional obligation brought a “gay” perspective to the study, illuminating certain values that had not been instantiated into institutional logics of the university’s culture.

Pilot Testing

Keeping in mind Merriam’s (1998) admonishment to test the interview protocol before putting it to use, a pilot interview was held at a university that is not in the sample. After the pilot interview, the semi-structured protocol was revised and reordered to reflect a more natural sequence of questions. Because faculty, staff and administrators-- as well as individuals from outside higher education-- are included in the sample, each interview protocol was individually tailored to accommodate the unique role of the respondent and the data I hoped to capture. A core set of questions, however, remained constant to enable later comparisons across individuals and universities.

Table 2. Sample Distribution

Affiliation of Respondent	No. of Interviews
<i>Within Higher Education</i>	
New Middle West University (NMWU)	6
Great Lakes University (GLU)	7
Industrial Heartland University (IHU)	9
<i>Outside Higher Education</i>	
American Civil Liberties Union (ACLU)	1
American Family Association of Michigan	1
Michigan State Senator	1
Total No. of Interviews	25

Interviews

Twenty-two interviews were held at three universities in Michigan between May and November of 2009. Data collection at each campus began with an initial contact and proceeded through snow-ball sampling. In addition, two interviews were held with the conservative sponsors of the 2004 Michigan marriage amendment, which prohibits the recognition of same-sex couples for “any purpose.” A third interview was held with one of the lead attorneys for a group that sought to retain domestic partnership benefits for public employees. The rationale behind these final interviews was to introduce the perspectives, values, and concerns of individuals and advocacy organizations on both sides of the same-sex marriage debate. In total, 25 interviews were conducted. Twenty-four of the 25 respondents consented to having the interview audio-recorded. Interviews ranged from 38 to 110 minutes in length. Twelve of the respondents self-identified as gay or lesbian, seven were women, four were persons of

color and two were foreign-born. See Table 2 for a description of the sample, including its distribution across the three campuses.

Interviewing may be the most common form of data collection used for qualitative studies in education (Merriam, 1998). While interviews take several different forms, I employed a semi-structured protocol. This type of interview allows the researcher to ask for the facts in a situation, as well as the respondent's opinions. It is a particularly flexible format, in that it additionally allows the researcher to follow-up upon points that are not anticipated before the interview begins (Wengraf, 2001). In an effort to be congenial to my respondents, I conducted interviews at the location of their choice and limited each session to 45 minutes. I began by forwarding a copy of the interview questions to the respondent one week in advance so that they were prepared for the questions that would be asked. At the onset of each interview, I introduced myself to the respondent, summarized the study and gave him/her a consent form authorized by the University of Michigan's IRB. Then I asked whether the respondent objected to me recording the session. If there was an objection, which happened in one case, I took notes on my laptop. If there was no objection, I began the tape recorder. As the interview progressed, I used various techniques to verify and probe for information, as well as feedback expressions and nonverbal responses to motivate and put the respondent at ease. I carefully tracked the time to ensure that all the questions on the protocol were answered. If we ran out of time or there was follow-up information needed, I followed up with the respondent via email or by telephone. At

the end of each interview, I thanked the respondent for his or her time and offered to provide an abstract of the study and its results upon completion.

Secondary Data Collection

My inquiries into the timelines and implementation details of the new policies that Michigan's universities developed in response to Proposition 2, led me to wonder whether fewer or more employees were covered under the new policies. In order to assess the effect of the new eligibility criteria on benefits enrollments, particularly those of same-sex partners, I requested data from each institution. At two of the institutions, I made the request to executive administrators who directed their human resource offices to comply. At a third, I knew from previous interactions that I would be unlikely to get cooperation from central administration. In order to find out what the enrollment numbers were at that campus, I asked a union director to request the data on my behalf. She did so successfully and passed the data on to me. Data from all three institutions are presented in the quantitative analysis at the conclusion of Chapter Six.

Document Collection

Data collection for case studies often involves observation, interviewing and document collection, though a researcher need not use all of these techniques in equal measure (Merriam, 1998). In this study, I relied upon interviewing, data requests and document collection as the primary methods of collecting data.

In order to underscore the unique character and importance of public policy in Michigan related to health benefits for same-sex partners, I sought all of the information I could find from non-profit advocacy organizations concerned with issues related to gay equality. Second, to build a solid understanding of the role of public policy and its recent impact on the provision of same-sex health benefits within Michigan, I reviewed all regional newspapers from the year 2000 onwards where the three universities are located. I also searched national sources (The New York Times, The Chronicle of Higher Education, Inside Higher Education, etc.) for articles related to ballot Proposition 2, the actions of non-profit political organizations and proposed or actualize legislation regarding same-sex marriage and health benefits for state employees. This background work was necessary in order to contextualize the court decisions that followed the passage of the referendum and the subsequent actions of the universities involved. My third step was to read all of the lawsuits, briefs and filings on Proposition 2. Fourth, it was critical for me to be aware of what had occurred on campus at each of the universities in question. To that end, I read all written policies, university-wide announcements and university-based newspaper accounts related to the issue of same-sex health benefits and the Michigan court decisions of 2007 and 2008. This document collection included reviewing the history of domestic partner benefits at each of the institutions in the study. This last portion of due diligence prepared me for the interviews, gave me an understanding of the constituencies at work on each campus, and provided me with a better overall understanding of the culture and climate at each campus.

Data Analyses

I employed NVivo software to create a database for all of the data collected at the three universities. The database includes 635 pages of transcribed interviews. I also collected data from myriad other sources including internal communications (letters and email), human resource data and a wide range of public documents (legal opinions, legal briefs, institutional policies, newsletters, news articles and otherwise). I used both *etic* and *emic* approaches to coding. First, I developed a preliminary list of codes using the conceptual framework. The preliminary codes included possible motivations on the part of the universities that I had gleaned from reading secondary sources (primarily newspaper accounts) and from talking with friends and colleagues at my own campus. These codes reflected the biases and insights of my own community which is heterogeneous, gay friendly, well-educated and international, but not particularly religious. Accordingly, I expected to find evidence of justice-based logics, such as concerns about diversity and gay civil rights. Secondly, I read through each transcript and document, allowing additional codes to emerge from the respondents' own words. Not surprisingly, the codes which emerged from the data varied substantially from my expectations.

I used several strategies to ensure the trustworthiness and credibility of the findings and conclusions. In addition to collecting information from multiple sources and institutions, I interviewed respondents with different perspectives: faculty, staff, government employees and attorneys to (Yin, 2003b). At each campus, I developed timelines that tracked the institution's procedural response to the constitutional

amendment and asked respondents for their feedback on it. As the final stage in the research process, I disseminated the dissertation to one respondent at each institution who agreed to do a member check. They read passages relevant to their institution and commented upon the accuracy of the interpretation. I incorporated these valuable comments into the final draft.

Limitations

Despite the strength of its research design, this study has a couple of limitations. Most notably, it is based on data describing just three public universities in a single state. While qualitative design is often the only feasible alternative when examining a previously unstudied topic, it nonetheless limits the generalizability of the findings to other states and public universities. However, in the other states where domestic partnership protections have been eliminated due to gay marriage bans it is probable that universities are employing similar logics. Therefore, it is possible that conceptual generalizability may emerge from the findings here. In particular, I alert the reader's attention to the parsing of LGBT issues from previously instantiated/institutionalized understandings of diversity such as race and gender.

The second limitation of the study relates to the organizational variance among institutions of higher education. As it has been noted, this study focuses on research universities—because they are better resourced, tend to offer more work-family policies than other institutional types and are generally considered to be emblematic of general trends within higher education. However, smaller institutions and many privately

controlled colleges tend to have more homogenous sets of students and employees (Bolman & Deal, 2003). In fact, it is possible that partner health benefits have not been enacted or re-enacted after the passage of Proposition 2 at some of these institutions. The study, therefore, cannot purport to reflect the institutional logics among all types of higher education institutions on this topic—only those of research universities.

Chapter Summary

This chapter provides an explanation of the research methods used in this study. Site selection, access strategies, primary and secondary data collection and data analysis, as well as the limitations of the study are each discussed in detail. These methodological choices were driven by the research questions and the institutional logics construct presented in the previous chapter.

CHAPTER V

LOGICS USED BY THE PROPONENTS OF PROPOSITION 2

The original intent of this project was to limit the scope of investigation to the institutional logics employed by the higher education community in Michigan to deal with the retraction of domestic partner benefits. However, it was soon discovered that these logics differed substantially from the logics that prompted the passage of the referendum in the first place. Accordingly, I found it necessary to identify and document the institutional logics that had inspired Michigan's ban against gay marriage. In order to fairly, and accurately, situate the study with these heterogeneous logics in the background, I interviewed two of the early and influential proponents of Proposition 2. One of these respondents leads a Christian advocacy organization in the state. The state chapter that he leads is affiliated with a national organization that has been highly active in litigation against gay civil rights issues. The other is a state legislator who describes himself as "the leading social conservative" in Lansing. The next section provides an analysis of these logics employed by these respondents, both in relation to the topic of same-sex marriage and to the more specific question of benefits.

While in theory, logics relating to referenda banning same-sex marriage could derive from any societal institution, they do not. Instead, they derive from Christian religious institutions. (This is not to suggest that people of other religious or atheistic

backgrounds did not support or contribute to the ban on same-sex marriage, but instead that its primary spokesmen within Michigan hail from conservative Christian backgrounds.) Having taken note of this general orientation, I now turn to the question of what motivated these actors to mount a petition drive for a constitutional amendment banning same-sex marriage.

At the time that Proposition 2 was passed, Michigan already had a statute banning the issuance and recognition of same-sex marriage licenses. Therefore, one of the questions that was asked of respondents was what motivated the timing of the constitutional amendment. According to one respondent, the introduction of the referendum was motivated by the ruling of an Ontario Court in June of 2003, which legalized gay marriage in the nearby southern Canadian province²⁹. His fear was that same-sex couples would cross the bridge into Ontario, get legally wed there and return to Michigan to file legal claims seeking recognition for their marriages. Five months after the Ontario decision, the Supreme Court of Massachusetts legalized gay marriage, and Maine passed limited relationship recognition in the form of domestic partnerships, spurring opponents of same-sex marriage to action in Michigan.

Initially, proponents of the ban attempted to get the legislature to put the measure on the ballot, but failed. (The measure required a two-thirds vote, which they were unable to secure for approval.) Then they launched a petition drive, in which they

²⁹ Ontario was the first of eight Canadian provinces and territories to overturn bans on same-sex marriage in that country. In December of 2004, the Supreme Court of Canada ruled to uphold the earlier provincial and territorial decisions, and in July of 2005, the Canadian government passed federal law redefining marriage to conform with the court mandate (Supreme Court of Canada, n.d.). Although the Netherlands and Belgium passed same-sex marriage laws prior to the federal decision in Canada, legal recognition granted to a lesbian couple retroactive to January of 2001 gives Canada the distinction of being the first country in the world to recognize gay marriage (Equal Marriage for Same-sex Couples, n.d.).

collected 500,000 signatures – slightly more than needed to put the referendum on the ballot. After a split decision by the Board of Canvassers and a subsequent Court of Appeals decision (which chastised the Board of Canvassers for considering lawfulness of the ballot proposal prior to its enactment) the marriage amendment was placed on the ballot (National Pride at Work, 2007). In the 2004 election, Michigan voters ratified the constitutional amendment by a vote of 59% (State of Michigan, n.d.).

Proponents of Proposition 2 advance five types of logics in support of restricting marriage rights to heterosexual couples. These logics are related to moral convictions regarding heterosexual marriage and homosexuality, reproduction and childrearing, the sanctity of life, views on homosexual marriage and misrepresentations of gays and lesbians.

God and Marriage

In order to fairly present the logics behind Michigan's marriage amendment, it is first necessary to understand the religious convictions that undergird them. As mentioned earlier, the campaign for Proposition 2 in Michigan was initiated by several conservative Christian advocacy groups. Though Proposition 2's largest funder was the Catholic Church (Ballotpedia, 2004), conservative groups wrote the referendum and circulated petitions in order to get it on the ballot. It is not surprising, therefore, that the respondents' logics derive from firmly institutionalized Christian beliefs. (There are many strains of Christian thought, which vary on a large number of topics, thus the reader should assume that there are a large number of self-identified Christians who

might disagree with the faith-based logics articulated by the proponents of Proposition 2, below.)

Peter Gome, a Professor of Divinity at Harvard, offers this insight into the Judeo/Christian basis of prejudice against homosexuals:

Nearly every such person who acknowledges an aversion to homosexuality does so on the basis of what he or she believes the Bible to say, and in their minds there is no doubt whatsoever about what the Bible says, and what the Bible means. The argument goes something like this: Homosexuality is an abomination, and the homosexual is a sinner. At Sodom and Gomorrah God punished the cities for the sin of homosexuality. Saint Paul and the early Christians were equally opposed to homosexuality, and homosexual practices are condemned in the New Testament church. Therefore, if we are to be faithful to the "clear teachings of scripture," we too must condemn homosexuality; it is the last moral absolute, and we compromise it at our own peril.

The Roman Catholic Church's position on homosexuality corroborates this interpretation. "Although the particular inclination of the homosexual person is not a sin, it is a more or less strong tendency ordered toward an intrinsic moral evil; and thus the inclination itself must be seen as an objective disorder" (*as cited by Corvino, 2010*).³⁰

For the respondents who supported Proposition 2, the belief that God created both mankind *and the institution of marriage* undergirds the view that homosexuality is a sin. Marriage is not simply a state-sanctified social arrangement; instead it is an institution handed down directly by the Creator.

God set up the institution of marriage when he created man and woman. That was going right back to the very foundation of history, and you say,

³⁰ Of course this understanding is subject to interpretation, and biblical scholars offer many different views on the subject. For an exploration of the discourse, see Siker's *Homosexuality in the Church: Both Sides of the Debate*, Boswell's *Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* or Helminiak's *What the Bible Really Says about Homosexuality*.

hey, has anything improved on that? Nothing has improved on it, and nothing ever will improve on it.

Because God created Mankind, Mankind is accountable to its Creator. And because God created marriage, man is obligated to maintain marriage in its original (i.e. heterosexual) form.³¹ The understanding of marriage as an institution handed down directly by the Creator justifies resistance to any attempt to reconcile it with more diverse forms of modern day family formation. It also creates a categorical distinction between those who are married and those who are not. This view of marriage defines homosexuals as the only group that is unable to participate in the institution, thereby also creating a hierarchical relationship between those who can marry and those who cannot. In other words, those who can marry and follow God's will are righteous and good, while those who cannot are immoral and depraved. In this sense, the word *marriage* and the defense of marriage as an exclusively heterosexual institution should not simply be read as a traditionalist political conviction, but also as a metonym for righteousness itself.

According to these respondents, accountability to God's will is unique to Christians—pitting them in opposition to the rest of society and motivating their advocacy on a number of social issues (from abortion to the teaching of evolution to gay marriage). One proponent of Proposition 2 explained his view of the divide between his religious community and secular society this way:

Fundamentally, it is very much a clash of worldviews. What they would've said 100 years ago is it's a religious war, and it's a war between people who hold to – in this country – people who hold to traditional Christianity versus people who have molecules to man type of thing,

³¹ Here the conservative Christian view on marriage departs from the Old Testament, in which marriage is represented as both heterosexual *and* frequently polygamous. For example, Israel (also called Jacob) married multiple wives and sired 12 sons who became the fathers of the Twelve Tribes of Israel.

evolutionary thought that we don't – we aren't really answerable to any other power outside of ourselves. And so, hey, if I'm an atom in the universe, I can do whatever I want to. It shouldn't affect anybody else. The problem is everything a person does affects everybody else.

For the same reason, the country's drift away from its Christian beginnings is deeply troubling to both respondents. The secular nature of Michigan's public university system, for example, proved to be a source of consternation.

I just can't tell you how offensive these people in higher education are—these guys have their PhDs, their doctorates, and they're all so broadminded, but yet, you disagree with them on some of the fundamentals, on did God create or did you come about by evolution? And oh, man—what they do out at NMWU is they teach evolutionary biology. I take a look at it and said the guy who came up with the classifications in biology was a creationist, but yet, you teach evolutionary biology!

They are so focused on their worldview—some of them might say, "I go to this church or that church," but their worldview, their real religious belief tends to be very secular, very evolutionist. And it's not because they can back it up scientifically. It's because that's what they believe, and you don't dare question it. It's a religious belief when it comes right down to it.

If you believe God created, as our founders did and as stated in our Declaration of Independence, if you believe that, then you have to say, okay, what do you owe the Creator? And they don't want to admit that. It's much nicer to believe in an evolutionary type of thing where, hey, there's no Moral Being that you have to answer to.

The other respondent also noted that contemporary understandings of the separation of church and state differ significantly from the understandings of our founders.

Unpacking these comments, we can sense a yearning, if not for theocracy, then a return to a simpler past, where society was more homogeneous, religious diversity meant diversity of Christian denominations and government favored Christian notions of morality over those of other religious or secular traditions.

Reproduction and Childrearing

In this section, I examine the manner in which proponents of Proposition 2 link the reproductive aspect of marriage to its heterosexual construction. One of the logics used by opponents of same-sex marriage is that the function of marriage is reproduction and childrearing and therefore, that the institution itself should remain exclusively heterosexual. One respondent advanced the argument in this manner:

Marriage is—the function, the basic purpose of marriage—is for children and it’s to procreate. And throughout history, throughout recorded history, marriage has always been between the two sexes. I mean, you can go into biology. You can go into history. You can go into whatever. It’s the function of a man and a woman to raise a child, okay? That’s the future. And to say that, no, we’re gonna try and redefine marriage and have it be something else I just think is totally illegitimate.

After describing marriage as the “basic building block of any society,” he goes on to warn me about the social pathologies that appear when marriage isn’t present.

When that building block is harmed, we get all sorts of social pathologies. Let me give you an example. You can go into our prisons and you can talk with -- 95 percent of them are young men—okay? And you talk to them about their family structure, and in most cases you will find that the father was non-existent, okay? In order to have a stable society you need a mom and a dad raising the kids.

The second respondent made a similar point:

Marriage between a man and a woman has proven its value to society throughout time, and it is a legitimate public policy position for a government institution to take to say that we’re going to compensatorily incentivize the institution which has proven its value to society as a whole. And every social science study says that children who come from a household headed by a man and woman who are united in marriage are less likely to be found in the criminal justice system, less likely to experience teenage pregnancy, less likely to do drugs, less likely to be physically abused. They're likely to be healthier physically, mentally and

emotionally. All of that translates into less of a burden on society and taxpayers, the more marriage is incentivized and the more widespread its practice.

To bolster the argument that marriage ought to remain an exclusively heterosexual privilege, respondents emphasize traditional gender roles, both in parenting and in the public sphere.

Each sex brings something unique to a marriage that a child needs both. You know, a child needs his mother. I'm gonna use "his" but it would be for either a boy or a girl. Each one needs his mother. Each one needs his father. And they need them working in harmony together, okay, and that's why – and there needs to be stability there for that child.

The respondent continues with an anecdote to illustrate his point:

I came home from work one day --my wife was a stay-at-home mom-- and she says, "Oh, I'm glad you're home." She says, "When you walk in the house," she says, "it's a male voice there saying 'Daddy's home,'" (That's how I'd come home: "Daddy's home!") And she said "The kids need that, and they love that, and it gives stability, and it gives authority in the house."

Especially when they get to be a certain age when these young boys turn out to be young men, it's kind of like Mom is Mom and I'm a man, okay? And Mom shouldn't tell me what to do anymore, you know. A guy has to get that independent part going, so who does he look to? He looks to the father. And if there's no father there, they will find a father substitute. That's why gangs become such a problem in our neighborhoods where marriage is becoming denigrated, okay, or where marriage – where you have a lot of single-parent mothers. The guys will go into a gang because they're looking for that.

In this view, marriage between a man and a woman (or more precisely, between a working man and a stay-at-home mother) is viewed as the ideal family unit in which to raise children. Taken together, these quotes reveal an archetype of marriage in which gender roles are static. Deviation from the archetype (such as the gang member without a father) are risky and carry serious consequences for children.

The Sanctity of Human Life

Corollary to the respondents' conflation of marriage with reproduction and childraising is a more general concern about the sanctity of human life. Below, one man tells me why he thinks same-sex couples' claim to marriage as a civil right is specious. From his point of view, the continuation of the human species is at stake when gay marriage is proposed.

You see, the problem that people get into is they start talking about rights, okay, without taking a look and saying, well, wait a minute. What's really going on here? This [the debate about same-sex marriage] is something even more fundamental than a person's civil rights or their constitutional rights. This is life, and that is what is missed in this whole thing. This goes way beyond anything that you enshrine in the law, for example, or in the constitution. You're talking this is a function that is done for the future. And why do people want to look forward to the future? I don't know but that's human beings. That's the way we are.

This respondent's comments expand the debate beyond the narrow jurisdictions of law to more fundamental concerns. But as the reader will see in the following excerpt, his concern for "life" is also closely related to the triumph of Christianity over other religions. In the passage below, give and take between respondent and interviewer shows the respondent wander from an argument about traditional families, to an argument about the birthrate in Western Europe, to an argument about the encroachment of Islam.

Respondent: in the long-run if you keep putting pressure on the family, especially on families that you wanna have be the model in society, then that family breaks down, okay... You start to get fewer and fewer people [who are married] and you just said it – wow-- most people aren't married anymore. And that's tragic! Because your society is going to go down the drain when that happens, as that continues to go on. And it may not be just in one year or two years. It may be in three generations,

but it does go down. And the pathologies that will come about as a result of that nobody will wanna live in that society.

Interviewer: Do you think Europe has a pathological society?

Respondent: Yes, yes.

Interviewer: Really?

Respondent: Oh, yeah.

Interviewer: Because they have remarkable productivity. They have, you know, countries like France and Germany have very high GDPs. They make fine products that we all buy.

Respondent: Sure.

Interviewer: You know, a highly educated population...

Respondent: But you see you're looking at it from a very materialistic standpoint. Europe is dying out. You know, their birthrate has gone way down. They do not even have a birthrate anywhere close to replacement rate. And the only thing that's keeping Europe afloat is the immigration, and Europe is going to go from being a what would've been a Christian nation – and I use that very loosely, whether Protestant or Anglican or Catholic or whatever – to they've become a very secular type of society where the churches are just museums now to where they will end up being a Muslim society in 50 years because the immigrants that are coming into France, for example, it's Muslim immigrants. And they have very strong beliefs about procreation and, yeah, in 50 years Europe will be Muslim, you know.

Interviewer: Could that be the savior of Europe?

Respondent: No.

Interviewer: The savior of their birthrate?

Respondent: No, I don't think so. Oh, if – no. It's – well, give me your question again because...

Interviewer: Well, I guess I'm hearing one of your main concerns is the birthrate issue.

Respondent: Yes, it is. It is.

Interviewer: So if we look at the example of Europe, I agree with you completely that their birthrate has ...

Respondent: Evaporated.

Interviewer: It's come to a standstill, and you can tell that they're very concerned about it.

Respondent: Because they're looking at the future, too, and what they see they don't like.

Interviewer: Sure, they've got this aging population and they've got a lot of social welfare and, you know, problems with cost and everything else. So I'm wondering if the influx of Muslim immigrants into Europe will not actually boost their birthrate.

Respondent: Oh, it will boost their birthrate, but the question becomes do the secularists that are not having children, do they want to in their old age be under Shari'ah law? And I don't think they do, because you take a look at that belief system [and you ask] the secular women, say, are you gonna wanna wear a burqa? Oh, okay, are you gonna wanna be the property? Well, not really. Well, you know, welcome to the Muslim world in Europe 50 years from now.

To underscore the importance of his point, the respondent invokes the specter of French women being forced to wear a Burqa after Muslims have taken over western Europe. He doesn't say, explicitly, that Muslims are attempting to take over Europe by reproducing more quickly than their neighbors -- but that is clearly the implication. Later in the conversation he indicates his awareness of procreation as an intentional social, political and religious strategy.

Fact is in some of the radical Muslim thought, they have what they call Jihad of the Womb.³² That means you move into these areas and you just have a higher population rate than what the native populations do and you soon outnumber them, and then you can impose Muslim law or Shari'ah law, okay. That's why we cannot ever count on France, for example, when we have problems with the Arab nations. We can't ever

³² The phrase "Jihad of the Womb" is widely used in the conservative Christian blogosphere. (See, for example, Hoffman, 2010). However, it is not a concept recognized or advanced by Islam (Glassé, 1989).

count on France. It's not 'cause they've always been wusses, okay, but it's because they're getting such a large Muslim population that they're looking at civil unrest if they come out for the United States.

His logic is clear; if the U.S. wants to remain a predominantly Christian nation, it had better raise its birthrate. This argument builds upon misrepresentations and stereotypes of the Muslim community in order to whip up enthusiasm for marriage and reproduction.

Views on Homosexual Marriage

In the view of these respondents, the prospect of same-sex marriage has terrifying, destructive potential. The main premise of the logic is that same-sex marriage will devalue heterosexual marriage and elevate gay and lesbian relationships to a position of equal social worth. One respondent, referring to the work he did as a coauthor of Proposition 2, related this tale:

Respondent: I spoke to a class of 20-somethings at Davenport University one evening— so I considered that to be more of a mainstream audience— and about a week later I spoke to a Republican organization down in Oakland County. Had the same experience in both places. I said there's something to take note of here.

I would go through all the reasons we thought legalization of so-called "homosexual marriage" was bad and, you know, people might – they might disagree, they might agree. But in both of these audiences when I cited what happened in Massachusetts in public schools and I said one of the results of the legalization of homosexual marriage, if we look at what happened in Massachusetts, is that in order to avoid lawsuits alleging discrimination the public schools will be compelled to teach your children that homosexual marriage is the moral, social and legal equivalent of marriage between a man and a woman. In both audiences, the women in the audience audibly gasped...

Interviewer: I wonder why it was the women who gasped? I mean, why would that be more surprising to women than to men or more shocking?

Respondent: I didn't take time to analyze it. I just passed it on.

The respondent's point is that members of his audience do not consider homosexual marriage to be the social or moral equivalent of heterosexual marriage. In his view, the question of gender is irrelevant.

In addition to the normative argument, respondents made the argument that legalizing same-sex marriage would devalue the formerly exclusive heterosexual institution.

You might wanna call it something else, but that is not marriage because we value marriage. We give it special tax status, okay? We give all sorts of special things to married couples because that is the basic foundation, the basic building block of any society...

We are putting a protection around marriage, because it's kind of like counterfeit money. Why do we get upset with counterfeit money? It's because it devalues the real thing, okay, so we get upset with counterfeit money, and it's a huge crime. Well, that's what you're doing with marriage when you start to do these other things. You're starting to say these counterfeits [are the equivalent], and it ends up demeaning the real thing.

The suggestion here is that offering the same legal and financial protections to same-sex couples that married heterosexual couples have would in some way diminish the social status of married couples. (I shall return to this point at the close of this chapter when I discuss nuances of relative status that reside in Nussbaum's sufficientarian views.)

Misrepresentations of Gays and Lesbians

In the course of interviews, I asked respondents to comment about the universities' decisions to offer health benefits to same-sex partners without recognizing domestic partnerships. Both respondents rejected a logic used by the universities – that

offering the benefits was necessary in order to compete for faculty and staff. Instead, they countered with arguments that relied on stereotypes of the gay community.

I think the question has to be asked to the universities why are you trying to enable destructive behavior? Because they know homosexual activity is destructive. You know, you take a look at the diseases that are rampant in the homosexual community. The fidelity is almost non-existent. They say, "Oh, this is my committed partner." When they talk about a monogamous relationship, it means, "We're living together, and we can have other sexual liaisons too, but we're the ones that are living together," okay? So even when they talk about a monogamous relationship, it's not what the average person thinks, oh, that's his wife or his spouse for life, okay. No, it's just that in spite of the other relationships, this is our primary one, but we can have others on the side. You know, the promiscuity is just astronomical. And you need to look at some of those things and say "Why would we want our taxpayer-funded institutions to start to enable destructive behavior like that even if they are a brilliant PhD?"

This passage begins with an oblique reference to HIV. References to HIV/AIDs are often used as "proof" that God disapproves of homosexuality, much as Jews were once associated with vermin and disease (Caron, 2009). Gome explains the religious basis of the perceived relationship between homosexuality and AIDS (or other types of destructive behavior) in the following manner:

The sufferings and persecutions homosexuals have endured over the centuries are signs of God's extreme displeasure with who they are and with what they do, and their behavior, as Saint Paul points out, is contrary to nature; and this then invites a terrible retribution. The AIDS epidemic is a terrible visitation, but it is the consequence, and only the latest one, of the sexual perversion of homosexuality. All of this can be summarized in the hate slogan of the notoriously homophobic Baptist preacher Fred Phelps, who pickets the funerals of gay men dead of AIDS with the sign GOD HATES FAGS. The source of that conviction and of its more subtle variations, we are told, is the Bible. (Gomes, 2002)

Like the association with AIDS, stereotyping gay men as promiscuous is another form of suasion. By employing these two rhetorical tactics, the respondent first

evokes a sense of disgust by emphasizing disease and immorality³³ in the gay community; he then portrays the claims of gays and lesbians to sameness as a fictional account. The result is to draw the listener into community with himself and to urge him not to be duped by claims of sameness – thereby constructing and solidifying an *us versus them* dichotomy.

The Moral Foundation of the “No Same-sex Marriage” Position

In examining logics against same-sex marriage, it is useful to begin with the ideal family archetype that is envisioned by them. We note several things at the onset: first, the argument relies on a traditional ideology of family,³⁴ not only vis à vis its composition, but vis à vis its relationship to sex. In other words, in the ideal Christian family (as represented here), the only appropriate place for sex is within the confines of the heterosexual, married household. Any sex that occurs outside of marriage is, therefore, immoral. Further, any sex that involves persons of the same gender is immoral, based on biblical interpretations of homosexuality and because it cannot be sanctioned by holy matrimony. Second, the function of marriage is reproduction, and therefore the primary function of sex within marriage is reproduction. Third, since sex is

³³ See Nussbaum, 2004, for a fascinating treatise on disgust. She argues that the cognitive content of disgust makes it unreliable foundation for social or legal decisionmaking. “Because disgust embodies a shrinking from contamination that is associated with the human desire to be nonanimal, it is frequently hooked up with various forms of shady social practice, in which the discomfort people feel over the fact of having an animal body is projected outwards onto vulnerable people and groups. These reactions are irrational, in the normative sense, both because they embody an aspiration to be a kind of being that one is not, and because, in the process of pursuing that aspiration, they target others for gross harm (p. 74).”

³⁴ See J.L. Dolgin’s work for an interesting treatise on the ways that law reflects and directs contemporary understandings of the family, particularly with respect to technology and reproduction (1997). Dolgin bases her analysis on the evolution of the role of reproduction in legal doctrine-- from the traditional view that reproduction was unalterably linked to biological processes, to the modern view that it is something which can be controlled through choice, negotiation and bargaining.

confined to marriage with the intent of procreation, children are generally assumed to be the biological offspring of their parents. The relationship between sex and family, and family and reproduction map nicely to what Dolgin calls the “traditional ideology of family.” But while this ideal archetype remains symbolically powerful, both within the Christian community and beyond its borders, contemporary society is filled with families that are structured and operate very differently.

Indeed, the traditional linkages between sex and marriage and marriage and reproduction and even sex and reproduction have eroded to the point that they lack relevance in many people’s lives. In a recent federal decision striking down part of the Defense of Marriage Act, Massachusetts’ Judge Tauro wrote that justifications for DoMA, which included protecting heterosexual marriage and encouraging responsible heterosexual procreation were so attenuated as to be “irrational” (Hirshman, 2010). Adoption, surrogate motherhood, In Vitro fertilization and other reproductive practices and technologies now provide many different choices for family formation -- not only for lesbian and gay couples -- but for infertile heterosexual couples and other types of queer families, too. While the Christian right focuses its energies on marriage, families continue to form and reform into new ad hoc configurations that were unimaginable a century ago. Dolgin writes:

The two notions of traditional (or old fashioned families) and modern families suggest a developmental process. Such a process has occurred and continues to occur. However the two notions of traditional and modern families are also presented as ideological antagonists in a contest for the future of the family. As such, the two notions represent contrasting options and are actually used in ways that variously ignore, subvert, elaborate or reconstruct the history of families. (1997, p. 15)

The importance of this point is that gay relationships are not the only thing being contested or perhaps even of primary importance. What upsets the opponents of same-sex marriage is the profound manner in which the family and the normative conception of family have drifted apart from the hierarchical Christian ideal over time.

Nussbaum, the Capabilities Approach and Proposition 2

At this juncture, it is useful to return to Nussbaum to determine how we might use the capabilities approach to adjudicate the just or unjust attributes of Proposition 2. In Chapter Two, I use Human Capabilities theory as a framework with which to contemplate issues raised by public and institutional policy regulating work-family balance. Relying on the same assumptions, I now propose that it is also an appropriate analytic with which to judge the fairness of Michigan's Proposition 2. The reader will recall that the purpose of a theory of justice is to delineate the basic structure of society that defines the terms of cooperation among individuals and groups. (See earlier discussion of Anderson, p. 53). Anderson reminds us that the central question at hand is whether the institution of marriage is consequential enough to affect the capabilities that citizens need to "function as equals in the system of cooperation," and if proscribing access to that institution to lesbian and gay couples will hinder them from functioning to the full extent of their capabilities.

In the pages preceding this, I have presented social science data showing that the institution of marriage offers stability and security for adults and

children—on this point, at least, proponents and opponents of same-sex marriage seem to agree— and a broad spectrum of legal and financial benefits. These benefits range from recognition as a legal parent, to access to healthcare, to property acquisition and distribution rights. All of these rights are available in one fell swoop to any heterosexual couple which is willing to marry, but unavailable to any same-sex couple, even if they happen to live in a state that offers same-sex marriage. Setting aside, for the moment, the social recognition and approbation that marriage also brings, the depth and breadth of these legal and financial rights are considerable.³⁵ Over the course of a marriage— 10, 20, 30 years or even more—their inaccessibility results a cumulative disadvantage to same-sex couples that is nearly impossible to quantify. Notwithstanding the difficulty of empirical comparison, it is clear that same-sex couples and their children suffer great inequality from not being able to participate in the institution of marriage.

Precisely because it is the *opportunity* for financial and legal security and social recognition that are bundled up into the institution of marriage, I believe that gays and lesbians need access to the institution in order to “function as equals in the system of cooperation.” The legal argument for same-sex marriage, though narrower, lends credence to this proposition. Marriage is something that has long been recognized by

³⁵ Some, but not all of these rights relate to federal law. In 1996, the U.S. Congress passed the Defense of Marriage Act (DoMA), which expressly prohibits recognition of same-sex marriage in the various states. In 2010, the Massachusetts State Attorney General and gay couples in Massachusetts challenged DoMA, arguing that its prohibition against extending federal benefits to gay couples was unconstitutional. The Obama administration defended DoMA, arguing that it was a transition policy designed to preserve existing social order while society digested the idea of same-sex marriage. District Court Judge Tauro examined the evidence and concluded that DoMA was founded solely on animus towards gays. Noting that animus alone is not a legitimate basis for government action, Tauro wrote: “If the Constitution means anything, it does at the very least mean that the Constitution will not abide a bare congressional desire to harm a politically unpopular group.” He then issued a judgment that rejected every rationale—including the Obama administration’s --for state laws that forbid same-sex marriage (Hirshman, 2010).

the Supreme Court as a fundamental right.³⁶ It has a fundamental, constitutionally protected status in our culture and in our legal system and the Supreme Court has said in many contexts that if the government is going to deny someone a fundamental right then it must have not only a good, but a compelling reason to do so (Sedler, 2003). I have also noted, however, that marriage is not a panacea, and that while it offers the opportunity for security and stability, it does not guarantee it.

What Proposition 2 accomplished in Michigan, therefore, was to put the fundamental right of a certain group up to majority vote. The majority, in this case, voted to prohibit gays and lesbians from participating in the institution of marriage. Thus, having established that the right to marry is consequential enough to affect the capabilities that citizens need to function as equals, I can now employ the human capabilities standard to determine whether Proposition 2 is just or unjust. In the following paragraphs, I shall argue that Proposition 2 is an unjust piece of public policy for two reasons: first, because it is based on subjective rather than objective valuations, and second because it violates four of the ten thresholds proposed by Nussbaum.³⁷

Regardless how one feels about Michigan's ban on same-sex marriage, it is incontrovertible that the principle logics undergirding it emanate from subjective valuations. Let's rehearse these briefly, using the data presented in the previous section. First and foremost, moral condemnation of homosexuality is based on strict Judeo/Christian interpretations of the Old Testament (or Torah). In this view,

³⁶ "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" (Loving v. Virginia).

³⁷ For a refresher on the Central Human Functional Capabilities, as identified by Nussbaum, see pp. 33-34.

homosexuality is “an abomination, and the homosexual is a sinner” (Gomes, 2002).

According to the proponents of Proposition 2, God created the institution of marriage as a heterosexual institution. In this view, marriage is a moral good, handed down directly from the Creator to mankind. Even if we admire the institution of marriage and want to defend it, however, we run into difficulty defending this assertion, since we cannot prove that God created it or that he created it as an exclusively heterosexual arrangement. We must, therefore, acknowledge that the claim that marriage is a godly institution is a subjective one, based on the moral authority we ascribe to religious beliefs. Similarly, various moral authorities claim that marriage, as bestowed upon man by the Creator has always been and should always be heterosexual. But again, this claim is not derived empirically (see Footnote #28, p. 79), and thus we must accept that it, too, is subjective in nature.

The other primary logic advanced by the proponents of Proposition 2 is that homosexuality (and therefore its legitimation through marriage) is destructive to society. However, there is little empirical support for this claim. Gays and lesbians are no more likely than heterosexuals to suffer from a personality disorder or emotional stress or to be psychologically unstable than heterosexuals (Herek, 1990). Aside from AIDS³⁸ and some accentuated risk-taking among self-identified homosexual adolescents, there are very few differences between homosexuals and the population at large. There

³⁸ It is true, for example, that men who have sex with men suffer from a higher AIDS infection rate than any other group. However, this is not the same as referring to gay men as a self-identified group. (The term “men who have sex with men” is intentionally used to refer to men who otherwise identify as hetero – or bisexual, but nonetheless have sexual encounters with other men.) Nor does it include lesbians. All of which is to remind the reader that the term refers to a particular group that only involves some members of the queer community and that also has direct ties to the heterosexual community.

are also social reasons for the patterns that do exist. Research shows that members of socially stigmatized groups are more likely than their peers to engage in risky, self-destructive behaviors because they have lower opinions of their own self-worth.³⁹ Much as they do when arguing that marriage lends stability to childrearing, proponents of the homosexuality-is-destructive logic intentionally avoid discussing the aetiological basis of the phenomenon. One can easily counter that if same-sex marriage were allowed, it would have the effect of reducing the social stigmatization of gays and lesbians, and in turn would likely lead to a reduction in these types of self-destructive behavior. Invoking images of HIV positive men and alcoholic lesbians, like raising fears of Sharia law in France is a rhetorical construction calculated to provoke fear through ignorance and stereotyping.

Several of the secondary claims made by Proposition 2 proponents can, in fact, be substantiated empirically. Among them is the claim that marriage provides a stable and nurturing environment for childrearing. This claim is widely substantiated by the literature, and therefore can be classified as an objective valuation. If we accept this claim as objective, we must not reject it without a logical reason for doing so. As it turns out, there is one overriding reason that we should reject this claim – that is that if heterosexual marriage provides a more stable and more nurturing environment for children than life in an unmarried household does generally, then there is good reason to suppose that homosexual marriage, similarly, would provide additional security and stability for children. In consideration of the many important social, financial and legal

³⁹ See, for example, Garoalo, Wolf, Kessel, Palfrey & DuRant (1998).

protections that marriage offers it is not at all surprising to find that children thrive within it.⁴⁰ Thus, in spite of the fact that this logic is objective in nature, we are led to reject it, because it does not take into account the obvious objection that the children of homosexuals would also benefit from the institution (perhaps even more so than the children of their unmarried heterosexual counterparts), due to the stigma and social disadvantages that they and their families suffer.

Now we move to the final proposition: that same-sex marriage would debase the institution of heterosexual marriage. I have already stated that in the first round of the federal case against California's Proposition 8, Judge Walker found that same-sex marriage presented no concrete harm to the institution of marriage.⁴¹ However, from a philosophical perspective, it is clear that concrete harm (as defined in legal terms) and symbolic harm may be different things. In fact, it seems reasonable to conclude that opponents of same-sex marriage do have some legitimate reasons to fear, at least on a symbolic level, the possible devaluation of the institution of marriage if same-sex couples were permitted to access it. In order to evaluate this claim fairly, we must ask ourselves what the outcome is that they actually fear. For example, they might fear that other Christians would no longer want to participate in the institution of marriage because it has been opened up to include gays and lesbians. But this seems unlikely,

⁴⁰ Among the benefits and protections of marriage are: hospital visitation, inheriting property, child custody and visitation, joint adoption of children and recognition at law of both parents, the right to obtain United States citizenship for partners and children, dependent health care coverage, family and medical leave, social security and government pension plans, and decisions regarding funeral and burial, to name just a few (Pridesource, 2004).

⁴¹ Defendants in the Proposition 8 case argued that it was necessary to exclude same-sex couples from marriage in order to motivate marriage-averse heterosexuals to tie the knot. This proposition was soundly rejected by Judge Vaughn (Hirshman, 2010).

since other Christians believe, as they do, that marriage between a man and a woman is still a moral and godly institution. On the other hand, they may believe that unmarried, nonChristian persons will have less respect for the institution than they had previously, because the new form of marriage includes homosexuals. This might be true, but the generality of this claim involves an infinite number of opinions and secular as well as religious orientations and thus its validity is almost impossible to assess. Meanwhile, yet a third possibility exists. This possibility is that individuals in the heterosexual as well as homosexual communities will have more respect for the institution – and the government—once it has responded to the call for social justice. (One can imagine, for example, that there were many reasonable people who felt relieved when the anti-miscegenation laws were struck down and they no longer profited socially or materially from an institution that marginalized an entire class of people.) We can see from this short exercise that value of a new, inclusive institution of marriage depends entirely upon the vantage point of the party trying to evaluate it, and therefore, the claim is entirely subjective in nature.

The subjective nature of this claim is grounded in its reliance on a social structure that allows married Christians to claim moral superiority over those who are not married. Marriage maintains a social order that bestows legal, financial and social advantages to those with access to it (heterosexuals), and withholds the same advantages to those without access (homosexuals). As long as it remains an exclusively heterosexual institution, gay people will be perceived as second-class citizens because they will be the only group without access to it. Once marriage becomes inclusive and

absorbs same-gender partnerships, the feeling of superiority that was engendered by the exclusion of gays will evaporate. There will no longer be an “in” group and an “out” group – all members of society will have equal access. Thus, the argument about the degradation of heterosexual marriage is, at its core, concerned with *relative* status. We know from the data, that the proponents of Michigan’s Proposition 2 viewed this superiority mainly in moral, rather than material terms. People love to belong to clubs, which can only be formed through the exclusion of others. (See the discussion of marriage as metonym for righteousness, p. 100.) Since we know from Anderson that objective metrics are superior to subjective ones, the subjective quality of the claim that legalizing same-gender marriage would debase heterosexual marriage gives us ample justification to set it aside.

In order to assess the just – or unjust—quality of Proposition 2, we have examined the principle logics set forth by the men who wrote the referendum and who worked to get in on the 2004 election ballot. We have shown, with the exception of the argument about risky homosexual behaviors,⁴² that these logics are predicated on subjective rather than objective viewpoints. This review of the evidence suggests that Proposition 2 does not hold strong ground with respect to a theory of justice that needs the basic structure to support the equal worth of all persons. However, its failure to meet an objective criteria is not necessarily fatal. In order to reach a final decision

⁴² Though this logic passed the subjective/objective metric test, we were compelled to reject it because it did not take into account the considerable stigmatization of gay and lesbians that deflates self-worth and leads to high-risk behaviors.

about the fairness of this particular piece of public policy, we must determine whether it conforms with each and every item on the list of central functioning human capabilities.

Michigan's Proposition 2 and the Central List of Human Capabilities

The next question before us, is whether Michigan's Proposition 2 violates the central list of functional human capabilities. To answer this question, we must turn to the list itself. Nussbaum tells us that the items in the list of central functional human capabilities are separate, distinct in quality and irreducible in number. Her list employs an objective metric and a sufficientarian method of distribution, meaning that each item in it suggests a threshold that must be reached. Importantly, Nussbaum defines unjust situations as those in which people systematically fall below the established threshold in one or more of the core areas. To aid us in evaluating Michigan's marriage amendment against this standard, we will place it before us as we contemplate each item.

Proposition 2 reads "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose" (Michigan Legislature, 2009). In addition to following the language of the proposition, we recall that the courts in Michigan interpreted the amendment to mean that domestic partnerships could not be recognized for any purpose – including but not exclusive to-- that of access to health insurance.

As we read through the list of central functioning human capabilities, we identify four thresholds that are violated by Proposition 2. See Table 3, next page.

Table 3. Human Functional Capabilities Disabled by Michigan's Proposition 2

<p>#3: Bodily Integrity Being able to move freely from place to place; having one's bodily boundaries treated as sovereign, i.e. being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.</p>
<p>#5: Emotions Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude and justified anger. Not having one's emotional development blighted by overwhelming fear and anxiety, or by traumatic events of abuse or neglect. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)</p>
<p>#7: Affiliation. A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)</p> <p>B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.</p>
<p>#10: Control over One's Environment. A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation; protections of free speech and association.</p> <p>B. Material. Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure.</p>

Bodily Integrity

The third item in the list of Central Functional Human Capabilities, Bodily Integrity, identifies “having opportunities for sexual satisfaction and for choice in matters of reproduction” as a central functional human capability. Proposition 2 conflicts with this threshold, because it presents obstacles for same-sex couples who wish to procreate. Under Michigan law, because same-sex couples cannot marry, they are not permitted to engage in second parent adoption. (*Second parent or co-parent adoption* refers to the joint adoption of a biological or nonbiological child by two parents.⁴³) For gay couples, as well as for unmarried heterosexual couples, this means that second parent adoption is impermissible (ACLU, 2002a). No matter how dedicated one partner is to the other’s adopted child, nor how long he or she has supported and cared for the child, she cannot forge a legal relationship. In functional terms, this means that same-sex couples are not able to shepherd their children through the courts, the medical system or even the school system with the same access and authority that married heterosexual parents have. Moreover, in cases where the partnership is dissolved, the nonadoptive parent risks losing all access to the child due to the absence of visitation and custody rights.⁴⁴ Thus, if we understand the term “reproduction” to encompass the modern family

⁴³ “Second parent adoption is a legal procedure that allows same-sex couples (gay and lesbian parents) to adopt their partner’s biological or adopted children without terminating the first parent’s right as a parent. Second parent adoptions give the child two legal guardians. It protects both parents by giving both of them legally recognized parental status.” (Belge, 2010)

⁴⁴ The history of second parent adoption in Michigan is convoluted. Some legal experts interpret the current statute to allow unmarried couples to adopt together. The ACLU, for example, believes that this interpretation is in the best interests of the child and is consistent with interpretations in other states that have adoption laws with similar language. In fact, second parent adoptions were permitted in one county for a period of ten years before the County Chief Judge reassigned all the cases to himself and ended the practice (ACLU, 2008b).

described by Dolgin, Proposition 2 directly interferes with the ability of same-sex couples to reproduce. This constitutes the first instance in which Proposition 2 violates the thresholds for a just society established in human capability theory.

Emotions

There are several ways in which Central Human Functional Capability #5, related to human emotions, is violated by Proposition 2. Capability #5 reads: "Not having one's emotional development blighted by overwhelming fear and anxiety, or by traumatic events of abuse or neglect. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)" Forms of human association may refer to a broad spectrum of interactions among individuals and groups. However, for our purposes here there are two central forms of association at risk. The first is the association between intimate partners. The second is the relationship between parent and child. Gay parents' inability to claim a legal relationship to their children – for the purposes of retaining custody, for example -- can very easily cause overwhelming fear and anxiety among parents who are prevented from accessing these rights by virtue of the fact that they cannot wed. (In fact, this is one of the fundamental fears of parents without access co-parent adoption rights). The same is also true of the children of gay and lesbian parents who, under Michigan law, can be easily taken away from a same-sex couple by the state or by biological relatives of the child. It does not take much imagination to see that such a situation might very well cause trauma to a child and blight his or her emotional development. These scenarios – fraught with consequences for both parent and child – could be avoided if

gay and lesbian couples in Michigan had access to marriage, and thus the same parenting rights that heterosexual married couples do. Thus, we argue that a constitutional clause that subjects same-sex couples and their children to this level of insecurity and fear violates Central Human Functional Capability #5.

Affiliation

The seventh item on the list of Central Human Functional Capabilities, Affiliation, is perhaps the threshold most closely related to the institution of marriage. Nussbaum articulates two parts to this item. I understand the first of these clauses as related to marriage: “Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction.” When we consider that marriage delimits access not only to legal recognition for the most significant relationship of choice in one’s life – one’s mate -- but also access to parenting rights, property rights, tax exemptions and health care, etc., it seems clear that it is *the primary* form of affiliation that must be protected. In the second clause, Nussbaum addressing protecting the social bases for self-respect and non-humiliation. She follows this with a direct reference to sexual orientation: “This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin.” In the American context, her meaning is clear: fundamental forms of affiliation must not be denigrated by animus against people of color, gays, religious minorities or ethnic minorities. From this, we conclude that Proposition 2 systematically and permanently violates this threshold for gay and lesbian citizens in Michigan.

One other curious finding emerges from the examination of the Affiliation threshold. As a capabilities theorist, Nussbaum advocates a sufficientarian method of distribution. But in the second clause she writes: “Being able to be treated as a dignified being whose worth is equal to that of others.” This sets up a very different type of distribution for human capabilities theory – one that suggests the *relative* worth of citizens to be of import. If we reflect upon the fact that Nussbaum is critical of Rawls’ difference principle for its failure to take into account a person’s ability to convert a standard package of resources into relevant functionings, and note that elsewhere she embraces the liberal conception that all persons are of equal worth (Nussbaum, 2008) we may not find this ambivalence entirely surprising. (Though it lies beyond the scope of this work to treat this philosophical wrinkle with the care and attention that it deserves.) More importantly, the emphasis on relative status also leads us to reconsider the argument that creating a more inclusive institution of marriage will in some manner diminish heterosexual marriage. On page 100 we rejected the same-sex-marriage-will-diminish-heterosexual-marriage argument, because of its subjective origins. We can now see, however, that it is also problematic with respect to Nussbaum’s concern about relative social status. Thus, it is apparent that Proposition 2 violates the seventh item on the list of Central Human Functional Capabilities in a direct and egregious manner.

Control over One’s Environment

One of the very pragmatic disadvantages that unmarried couples face in the United States is the inability to access the many rights and privileges reserved for married couples. Protections granted to married heterosexual couples, but denied to same-sex

couples include: hospital visitation, Social Security benefits, immigration, health insurance, estate taxes, family leave, nursing homes, home protection and pensions (HRC, n.d.). Another right routinely denied to gay and lesbian citizens is the right to equal opportunity employment.⁴⁵ This is not only true at the national level, but true among many states, including Michigan (HRC, 2010).⁴⁶ Property distribution rights have also long been associated with the institution of marriage and are, from the legal perspective, one of the primary reasons the state is involved in issuing and controlling marriage licenses. Without access to marriage, gay and lesbian citizens are deprived of the ability to automatically inherit the property belonging to their partner, unable to avoid probate, and unable to claim federal estate taxes among other rights, unable to claim COBRA benefits and unable to claim state pensions or social security benefits belonging to their partners. Since the only group currently denied access to marriage by Proposition 2 is that of same-gender couples, the constitutional amendment clearly violates Nussbaum's premise that one ought to have control over one's environment. We conclude that threshold number ten on the list of Central Human Functional Capabilities is violated by Michigan's marriage amendment.

⁴⁵ Employment discrimination remains legal in the United States based on the sexual orientation of the employee.

⁴⁶ The Human Rights Campaign notes that "Fairness in the workplace has been recognized as a fundamental right protected under federal law. Currently, federal law provides basic legal protection against employment discrimination on the basis of race, gender, religion, national origin or disability, but not sexual orientation or gender identity and gender expression (HRC, 2010)."

Conclusion: Proposition 2 is an Unjust Law

In conclusion, we find Michigan's Proposition 2 to be an unjust law. It not only relies upon subjective valuations and misinformed stereotypes about gays and lesbians, but in doing so, it violates four separate thresholds articulated in the list of Central Functioning Human Capabilities. First, it violates the requirement that every citizen have bodily integrity: that is to say, that every individual should have opportunities for sexual satisfaction and for choice in matters of reproduction. Second, it violates the requirement that every citizen have the ability to express their true emotions, including the ability to love and to care for the people who love and care for them. Third, it violates the requirement that every citizen have the right to affiliation, including the right to self-respect and nonhumiliation; this incontrovertibly includes the right to marry the person of one's choice. Fourth, it violates the requirement that every citizen have control over her/his own environment, including the right to seek fulfilling work and to inherit the property or state benefits of a loved one.

In short, the logics proposed by the respondents in this study that justify Proposition 2 are not really logics at all, but non rational (if firmly held and fondly embraced) beliefs. These arguments find their genesis in faith-based logics that are impossible to prove or to disprove. Religious freedom is, itself, one of the hallmark traits of our democracy. It is important to note that Nussbaum herself is not unconcerned with religious freedom. In fact, it would be an egregious misrepresentation of human capabilities theory to suggest a lack of concern for Christians' fundamental right to live their own lives according to the strictures of their

faith. For example, Nussbaum has come out on record as opposing the recent ban on burqas in France (2010). Instead, she embraces the Rawlsian notion that all members of a cooperative democracy must agree upon one central precept: the equal worth of all persons. Any belief, whether religious or secular in nature, can be exercised as long as it does not interfere with, occlude or deny the equal worth of all persons (Nussbaum, 2004). In explicating the normative principle that demands respect for conscience, Nussbaum writes:

Respect does not require either the public sphere or individual citizens to approve of the theological and ethical claims of any particular religion. Indeed, in order to avoid endorsing one religion over another, or religion over nonreligion, the state will wisely seek to avoid making public statements of either agreement or disagreement. It won't say that the Roman Catholics are right, and it also won't say that they are wrong about ultimate reality and the Buddhists are right. To say such things is to establish a public orthodoxy. The hope is that public institutions can be founded on principles that all can share, no matter what their religion. Of course these institutions will have an ethical content, prominently including the idea of equal respect itself. But they should not have a religious content. (2008, p. 23)

Thus, in invoking the Human Capabilities theory we proclaim our support for the free exercise of religion and simultaneously find that Proposition 2 violates the foundational precept of our democracy: that all persons are created equally and, therefore, should be treated as equal in worth by the state.

Chapter Summary

The beginning of this chapter presents data from two respondents who were politically active in the passage of Michigan's marriage amendment. It explores in some depth their attitudes toward homosexuality, traditional marriage, the role of religion,

the state and childrearing. The chapter concludes with a new form of policy evaluation, in which Human Capabilities theory is employed to adjudicate the fairness of Michigan's Proposition 2.

CHAPTER VI

DESCRIPTIVE CASES

Case No. 1: New Middle West University (NMWU)

NMWU was the first university in this study to design and implement an ODB policy (See Figure 5). This was due to the fact that its open enrollment period for faculty came due before either of the other universities in the study. One executive administrator was quite open about this fact:

We were in the unfortunate position of being the first university that had open enrollment. We had our open enrollment come up before anyone else's did. We had to make a decision first, before any other institution did.

NMWU's open enrollment for benefits started on April 16, 2007. What remains interesting about NMWU's adaptation is not that it was the first among the three institutions to implement an ODB policy, but the details of how it organized the open enrollment, managed its board of regents and communicated with staff and faculty.

Political logics played an important role in how NMWU responded to the loss of domestic partner benefits. NMWU's Board of Regents has historically been more conservative than the boards of either IHU's or GLU's. This factor played into the university's enactment of the sexual orientation clause of NMWU's non-discrimination policy, its relatively slow adoption of domestic partner benefits during the 1990s, and its

highly astute political approach to implementing the ODB policy. NMWU was the last of the large, public research universities in Michigan to adopt DP benefits for faculty and staff. When the push came to enact domestic partner benefits in the mid 1990s, some members of the gay and lesbian faculty group outted themselves in front of the board in order to offer testimonials about the hardship they faced finding healthcare for their families. But the proposal was tabled, in spite of a large public turnout, when Democratic regents realized that they did not have enough support to pass the measure. Proponents of the benefits were forced to reformulate their strategy; in the end, it took several years of wooing regents and campaigning for Democrats in order to change the board composition. Several years later, the board finally approved DP benefits, albeit with the caveat that residence life staff would be excluded from eligibility.

Acknowledging this history, one decision-maker described her reaction to the 2004 passage of Proposition 2 and its subsequent interpretation in the Courts:

I felt that it was a step back from our progress towards creating a campus environment that supported same-sex partners, and I think we as an institution had worked particularly hard to create both an environment that was supportive, but indications of support, including things like this benefit. Along with health and dental, for example, we had other benefits, if you will, that were attached to what we had as a part of our domestic partner benefits.

She went on to describe the challenges associated with the state's new regulatory requirement that all public employers rescind domestic partner benefits.

It threw us into this state of what do we do now, and it created quite a bit of fear within the community, both within the LGBT community—but I

think also for those who are supportive of the community on campus. Certainly this office, and I think the administration. We were concerned about how it would affect our ability to recruit and retain faculty and staff. Certainly, in a state that seemed to be hostile to a community, how would that affect our ability to recruit students as kind of a byproduct of this kind of shift? So there was quite a bit of apprehension, but what made me proud was I think the way that we chose to approach it.

This respondent's comments underscore the important symbolic, as well as practical, function of domestic partnership benefits at NMWU.

In 2007, NMWU's administration went quietly and strategically about designing a new category of benefits eligibility without officially involving the Board of Regents until the policy had been implemented and open enrollment was finished. It wasn't until 2008, after the Michigan Supreme Court had conclusively eviscerated the state's domestic partner protections that NMWU's executive leadership went to the Board to request permission to suspend the then-defunct domestic partner benefit policy.

One of the unique characteristics of NMWU is its active gay and lesbian faculty and staff organization. This organization was created when gay faculty and staff organized themselves to push the university to include sexual orientation in its nondiscrimination clause during the 1990s. Unlike gay and lesbian, bisexual or transgender-identified faculty at GLU and IHU, NMWU's faculty group has an active presence on campus, a monthly newsletter and annual meetings. The group's participation in the response to the same-sex benefits issue was a vital and unique component of the larger university's adaptation.

Immediately following the Appeals Court decision in February of 2007, the university President contacted the group and attended the annual meeting. He told

them that he did not know what legal options the university had, but that he had directed the general counsel's office to investigate possible solutions. He also asked the group to give the legal team time to develop a strategy before demanding a public statement from the University, so that the Board would not be compelled to take a position.

The President's prompt, pro-active response had the affect of reassuring the gay community and allaying fears. The director of the LGBT group phrased it this way:

This was a much more positive approach than we anticipated. The history at NMWU under the previous president had been look, put your finger in the air and see which way the winds are blowing. Never take leadership on these issues. Don't do anything until you've got cover from the Board of Regents. This was the first time the university senior administrator had come to us and said, "We're gonna do something proactive. Give us time to figure out what that's gonna be." So we were actually very positively surprised by this approach and very pleased at his forthcomingness.

Because it understood the political dynamics at work, the group complied with the President's request to keep a low profile on the issue. Ultimately, the gay and lesbian faculty groups cooperation gave him the latitude to come up with an administrative solution that simultaneously met the needs of same-sex couples and complied with the new law.

NMWU's efforts to stay under the political radar included convening two meetings for employees with existing DP benefits in mid-April. The human resource and legal teams had already developed the ODB policy, which they unveiled privately at these meetings. Accounts from respondents indicate that these information sessions, like the President's earlier appearance at the gay and lesbian faculty group meeting,

boosted morale and fostered a deep sense of appreciation in the community for the administration's pro-active and sensitive response to the issue. One lesbian respondent recalled the question and answer period at one of the meetings:

There was one question -- I can so clearly remember this. One person asked [an HR representative], "Well, can you tell us how many people at NMWU this will affect?" And without missing a beat, the representative says, "Every single employee." It was just so incredibly moving... You know it wasn't one of those, canned, made-up decisions. She just said, "It affects everybody, all of us." It wasn't like, "Well, there's 62 people getting benefits..." No—there was absolutely no question. It was astonishing to me.

The respondent's account of the human resource meeting emphasizes the low expectations with which LGBT faculty and staff entered the meeting, and a genuine sense of surprise that administration viewed the loss of domestic partner benefits as an important issue which affected everyone.

Another gay female staff member, with a long history at the institution, was also surprised by the administration's proactive response:

The university administration was very supportive through the entire appeals process. And the minute that the Appeals Court thing – you know, it was almost like we didn't have to ask. It was almost like somebody had already figured out what we're gonna do if we lose this appeal. And then they told us, "We're doing [ODB] for the staff who are not currently covered by contract. We're just gonna do it." It was amazing to me. *[Laughter]*. You know, I mean, usually, you don't expect somebody to just hand you something without you even asking for it, and we didn't even have to ask for it. So that was really wonderful!

The LGBT community at NMWU was accustomed to being treated as a class apart, and having to fight at every turn for equal opportunity. She continued:

It kinda shocked me, because usually, NMWU—you know, I love this university—I've worked here for so long. But sometimes, I get so frustrated because they won't take a risk. There's been so many times

when I felt like, “They need to stand up.” And I understand that they’re concerned about public perception, they’re concerned about public relations. You know, we had other issues like same-sex student couples living in the residence halls, and I know that just makes them shake in their boots, because they don’t want parents thinking that, “Oh, we let these kids have these little orgies in the res halls and all of this.” But in this case, they said, “We’re gonna step up, and we’re gonna be the leader,” and then it kinda gave political cover to [GLU] and [IHU] and the other schools in the state to say, “We’re gonna do that, too.” I was extremely proud of them for doing that. I was really surprised, but I was very, very proud.

This woman’s comments, like those of the LGBT group director, reflect a sea change in the tenor of NMWU’s leadership on gay issues.

The feelings of surprise expressed by all of these respondents had its roots in their understanding of NMWU’s identity as an institution. One respondent described this identity as dependent on the university’s reputation as an academic institution in the land grant tradition, connected to the region in which it is located by pragmatic programs of study and the everyman type of student it attracts.

NMWU is not Berkeley or Brown. You know, it doesn’t have a national reputation as being the breeding ground of radical progressive stances. It never has been, you know—we train farmers, and even women and GI’s. And still 40 percent of our students are first generation. I mean, 85 percent of our students are in-state, which is much higher than [IHU’s]. So it’s more of a kind of blue collary kind of place, and that’s its identity as an institution.

The respondent went on to illustrate the link between the institution’s history of executive leadership, its identity and its reluctance to take heroic stands on issues of social change. After describing the previous president as a “conservative stick in the mud,” and that the commencement speakers under his watch were Condoleezza Rice and Dick Cheney, she continued:

So there's this sort of like, you know, the land grants idea of – you know – local connection, fairly responsive to the State, so maybe there's that sort of passive inclusion... sort of like we're not gonna push the state to accept things it's not ready to accept. So in that way it does seem pretty consistent with the role of the university.

I asked her if the university's response to the amendment and to the subsequent court decisions was consonant with its history as an institution. She replied:

I would say so. It was – it was consonant in many ways. The lack of public statement about it and yet doing a socially progressive thing. The care and attention to individuals, I think, is very consonant with my experience here. I had a conversation with my Dean in the middle of this, and she said to me directly, "If they take away domestic partner benefits at MSU I will increase your salary the amount it will cost you to buy insurance from us." Now she didn't make a big announcement to the whole faculty about it but she said, "It's important to us to keep you here, this is what we'll do."

Like the respondents quoted earlier, this respondent never expected her institution to publicly object to Proposition 2 or to put up a legal challenge to the court determination about domestic partnership benefits. However, her story reveals an ethic of care that she clearly values.

NMWU's role as a state land grant institution created a cultural expectation among faculty and staff that it would resolve the benefits issue without fanfare, and without directly challenging the state prohibition against same-sex marriage. Consistent with these political logics, NMWU did not file any legal brief on the issue – even amicus curiae-- until more than a year later, when its new ODB policy was challenged by one of the state's conservative Christian organizations. The university's low profile response was consistent with its history as an institution that had allowed other universities in Michigan to take leadership on issues related to affirmative action. At the same time,

it's speedy and effective management of this highly politicized problem signaled its continuing commitment to include the gay community on campus. In part because it belied expectations, central administration's proactive and hands-on approach – which included a visit to the gay and lesbian faculty organization's annual meeting by the president of the university – had the effect of surprising members of the gay community and fostering a sense of allegiance to the institution.

Strategically, NMWU's response was similar to IHU's. In communications with the staff and faculty, the president stressed the importance of inclusion and its centrality to the institutional mission.⁴⁷ But the president's hands-on approach differed from the other institutions in the study: at IHU and at GLU, communications were handled by primarily by human resources. NMWU's president was widely perceived to be supportive of the gay community and had officially, and consistently, identified inclusion as one of the institution's core values. He had a reputation for being both pro-LGBT and aggressively anti-racist. Undoubtedly, the both his actions and words played a critical role in the institution's response. The president's personal touch, the institution's clearly articulated commitment to inclusion, and the lack of expectations that the campus would take a heroic stand on what could be perceived as a "liberal" social issue combined to make both faculty and staff appreciative of the administration's response. Whereas the narrowly constructed, quiet tactics of IHU were condemned by

⁴⁷ Of interest here is the rhetorical distinction between the word inclusion and the word diversity. At NMWU, gay and lesbian issues are specifically – and almost exclusively—referred to as issues of inclusion. However, at IHU and at several other local universities, the nomenclature ranges from inclusion to diversity. The connotations of these two terms differ in terms of the political audiences they seek to appeal to and the constituencies which they refer to; the term "diversity" usually connotes race, ethnicity or gender, whereas "inclusion" is often used to refer to persons with disabilities or members of the LGBT community.

some of its faculty and staff, the truly *sub rosa* tactics at NMWU were applauded by its gay constituents.

The only real friction that arose at NMWU, surfaced in negotiations between the administration and the graduate student union on campus. Though the campus was the first in Michigan to offer an alternative to domestic partner benefits, its first collective bargaining cycle in wake of the court decision did not proceed smoothly. At NMWU, the coalition is composed only of unions for support staff only; the graduate student union had to conduct negotiations on its own. Its contract expired a short three months after the university implemented the new policy for faculty and non-represented staff. Given central administration's frequent characterization of NMWU as a welcoming and inclusive employer, expectations were that the graduate students' union would be offered the ODB benefit that had replaced the domestic partner benefits in the coalition contract. However, the administration did not put the new designated beneficiary policy on the table in the initial round of negotiations, nor did it offer any other alternative to the old policy. Instead, it argued that because few graduate employees had utilized domestic partner health benefits in the past, there was little need for a replacement.

The administration's reluctance to offer ODB benefits to the graduate union raised the ire of student negotiators who went to the gay and lesbian faculty organization for help. In response, the LGBT organization sent a letter to the university's executive leadership expressing concern that the administration was backtracking on its promise to maintain an inclusive workplace.

If one purpose of [designated beneficiary benefits] is to signal faculty and staff that [NMWU] remains an inclusive and supportive campus, able to attract and retain the best and brightest, the number of those employees qualifying for those benefits should be immaterial. To tell graduate employees that small numbers of them taking advantage of those benefits is a reason to withhold them from all flies directly in the face of that. The signal sent then, is exactly the opposite. NMWU will be seen by prospective LGBT graduate students as an exclusive campus, one that does not value their presence (ironically) because there are not enough who qualify for these benefits. And once this signal has been sent (however inadvertently), it is an impression that will be very difficult to change, and one that will have ripple effects across all employee categories. It is also a very unfortunate precedent, as the University approaches negotiations with other campus unions.

The president himself responded to the letter, acknowledging the faculty organization's concerns and saying "I continue to believe that an inclusive campus environment is a critical requirement to recruit and retain." The faculty organization was then told by someone close to the president that the graduate students could attain other designated beneficiary benefits if they were persistent. This back channel message was communicated to the union and, indeed, within two days the graduate students had attained a commitment from administration negotiators that the benefit would be in the contract. In the end, however, the graduate student union was forced to concede a cap on the number of members they could cover with the policy. The cap was settled upon at 15.

The cap on the number of graduate students given access to health insurance was viewed with umbrage by the LGBT faculty organization (see more on this topic in Chapter VII), but it was accepted by the union because it sufficed to cover the number of employees who had previously been covered under the domestic partnership policy. Because the new designated beneficiary policy expanded the potential universe of

eligibility from same-sex partners only to heterosexual partners as well, university administrators had legitimate concerns about cost containment. Estimates of the number of heterosexual, unmarried couples who would take advantage of the new policy would later prove to be inflated. But at the onset of negotiations with the graduate student union, the university had little else to go on except the concern that large numbers of students would use the health benefits to cover an unmarried partner or friend. In my estimation three factors combined to make the graduate student union's negotiations for health benefits difficult: central administration's concern about cost containment, the graduate students' low position in the university hierarchy and the timing of the graduate students' contract cycle. Later collective bargaining at NMWU (both coalition and individual) was characterized by a willingness on the part of central administration to offer the new benefits policy. While it is clear that there was an interplay of factors involved, the university's increasing willingness to offer ODB benefits underscores the important role that union negotiations played in creating internal political pressure on the administration and in establishing the new policy as a norm.

In the end, the *sub rosa* approach taken by NMWU helped to keep its political and legal exposure to a minimum. At the same time, the speed with which it addressed the issue of benefits and its sensitive handling of the gay community enabled it to foster allegiance and to keep the same-sex partners it had.

See Table 4 (page 155) for a comparison of benefits enrollments at NMWU and the other universities in the study before and after Proposition 2.

Case No. 2: Great Lakes University (GLU)

GLU was the second of the three universities to establish a new health benefits policy for same-sex partners and family members (see Figure 4 on page 144). It established the new ODB policy for non-represented employees in January of 2008. A combination of market logics, isomorphic tendencies and related adaptations led to the development of a more exclusive policy than that of either NMWU or IHU. GLU's policy includes the same cohabitancy requirement that NMWU has, however, unlike NMWU or IHU, GLU also stipulates that the employee who registers for the benefit must be 26 years or older.

GLU, as an institution, does not have the national reputation that IHU has for battling civil rights issues, but it has a rich and diverse history. The university first established domestic partner benefits in 1995, only nine months after IHU.

By the time I was here in '96 it [same-sex benefits] was just accepted. It was like, of course, this is the right thing. And I think there are plenty of administrators who take advantage of this. I mean we had an openly gay president of our university here. He had a partner, you know and – not like he really announced it - but I mean he didn't fight it. Everybody knew. And so anybody I've talked to, whether they're an administrator or a bargaining unit member, I've never heard one peep against it. It seems well-established and well-accepted.

A faculty member noted that the affirmative action issue didn't have the same galvanizing impact at his institution as it had had at IHU, but that it had still overshadowed the same-sex benefits issue:

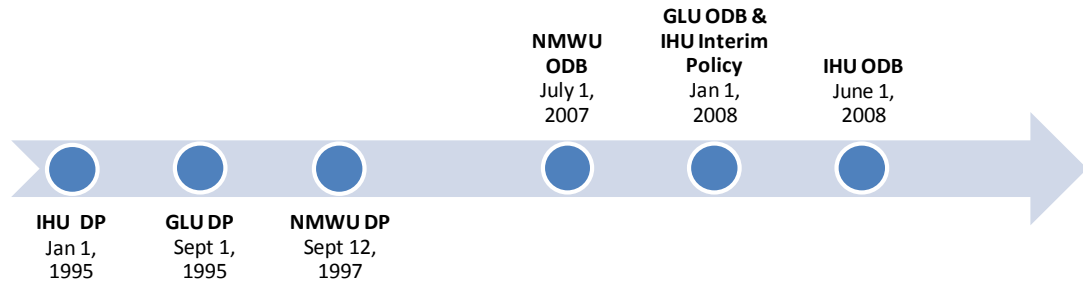
I do think that people tend to be more concerned about the racial justice issues than the sexual minority justice issues because we're a smaller minority. And because when we talk about same-sex relationships there's still, for some people, a kind of "ick" factor. They don't want to

talk about these things. It makes them think of gay sex and they don't want to think of gay sex, so they don't want to think about our relationships. So yeah, I do think that the second Prop 2 is more visible at the university than the first one.

Consistent with its history of supporting same-sex benefits, GLU wrote amicus briefs for the plaintiffs as Proposition 2 wound its way through the Michigan judicial system. These briefs, filed in conjunction with those of IHU, relied mainly on arguments related to recruitment and retention and suggest strategic logics related to diversity and inclusion.

Of the three institutions in the study, the administration at GLU issued the fewest number of communications with faculty and staff on the topic of same-sex benefits. To some extent, this is probably due to the fact that the number of employees with domestic partner benefits (fewer than 20) is very small. However, at GLU, unlike IHU and NMWU, there was no talk of inclusion. Nor was there much internal communication with staff and faculty. Prior to the election in 2004, the president of the university issued a statement indicating that whether or not the same-sex marriage ban was passed, GLU would defend its right to offer health benefits to same-sex partners. And, while privately, he identified the issue as one of "civil rights" there were no internal communiqués to this effect. When GLU implemented the new ODB policy for non-represented staff, there were no meetings or letters – simply a posting on the human resource website. Later, when the ODP policy including heterosexual unmarried partners was added to the coalition bargaining agreement, faculty were not notified by human resources—but by the union, instead.

Figure 4. Implementation Dates for Domestic Partner Benefits (DP) Policies and Other Designated Beneficiary (ODB) Policies for Universities in the Study



In fact, the administration at GLU was reluctant to discuss how it had reached the decision to offer ODB or what internal considerations there had been. When I came along to request IRB access to investigate the topic on campus, it took me nearly six months to obtain permission from the Office of the Provost. When I did receive permission, he noted that the administration had been “thrown into discussions” by my request. At another stage, I was sent to talk to an informant who had no information about same-sex benefits. Finally, when I returned to the Provost to request help, he sent me the following email message:

As for the university's positions or how we have "handled the issue" I cannot give you more help. We are not interested in participating in an analysis of "how we handled the issue." Our policies are clearly stated and of course you can have access to those. I suggest you contact the Associate VP for Human Resources if you want to know more about the policies. But, I cannot provide you with inside information or even any insight into the university's position.

In his work articulating five frames of action in professional practice, St. John describes the difference between open strategic action and closed strategic action as

“the skill of defining goals and adapting practices from communicating with others about goals” (2008, p. 140). St. John’s typology offers a systematic way of assessing GLU’s potential for transformational action on the issue of same-sex benefits. With its lack of communication with internal constituents, and its reluctance to explain its process to an outside researcher, GLU seems to embody the closed strategic approach. Notwithstanding the reticent nature of GLU’s administration, it may still be that strategic logics related to diversity and inclusion partly drove new policy formation. However, if this was the case, central administration missed the opportunity to communicate the fact to members of the campus community, and thereby the opportunity to harness the symbolism of same-sex benefits as measure of inclusion.

Several elements in the development of GLU’s policy reveal isomorphic logics at work. First, GLU instituted its ODB policy six months after NMWU. But unlike IHU, it did not develop any interim policies aimed solely at creating access for same-sex couples in the period between the passage of Proposition 2 and the Appeals Court decision in 2007. In other words, the organizational adaptation in this case was primarily mimetic, rather than instrumental. Second, GLU mimicked NMWU’s cohabitancy period—setting the minimum requirement for eligibility at 18 months, rather than the six months it had under its former domestic partner benefits policy. Last, not least, after watching NMWU tussle with the graduate student union over a cap on the number of benefit enrollees, GLU intentionally added an age requirement to preclude most graduate students from eligibility.

It is difficult to assess with certainty whether exclusionary provisions, such as these isomorphic adaptations, are influenced by homophobia, cost concerns or both. However, of the three universities, GLU faced the most serious financial constraints; concerns about cost and limiting institutional exposure were paramount. GLU began its analysis of the same-sex benefits issue with preliminary estimates that had been generated by IHU. According to respondents, the estimate predicted that if the policy were expanded to include unmarried heterosexual couples, total enrollment in the health benefits program would increase by three percent. Though the number of domestic partners at GLU was very low—only 20—decisionmakers settled on exclusionary age and cohabitancy criteria in order to “limit institutional exposure.”

Resource containment motivated GLU’s central administration at every step of ODB development and implementation. One of the unique features of GLU is the fact that its faculty is unionized and part of a larger coalition that includes unions for support staff (clerical, administrative professional, engineering, etc.) and graduate employees. Because the policy for non-represented employees was instituted in January of 2008 and the coalition contract did not expire until July of 2009, nearly a year and half passed between the administration’s implementation of the policy for nonunion staff and its negotiation with the labor coalition. When the time came for negotiations, the administration was unwilling to open up enrollment to unmarried heterosexual partners until the old contract had expired. This type of cost-shaving maneuver (it added a two month delay to coverage for these enrollees) didn’t impress one of the union directors on campus: “I think they still could have offered a goodwill gesture that benefited the

employees – but they didn't." A human resources informant, on the other hand, stressed the assumption that whatever was negotiated in coalition bargaining would soon spread across campus. "They [the faculty union and its coalition partners] tend to set the pattern for other unions." The tenor of the negotiations at GLU indicate that central administration was primarily concerned about cost and unwilling to extend itself in small ways that may have ingratiated it with its represented employees. One of the same informants also described frustration dealing with the institution's general counsel, who was reluctant to remove the "pilot" designation from the program, well after it had been discovered that few additional employees had signed up for the benefits.

See Table 4 for a comparison of DP benefits enrollments at GLU in comparison to the other universities in the study.

Case No. 3: Industrial Heartland University (IHU)

In 2007, the same year that the Michigan Court of Appeals struck down access to health insurance for domestic partnerships, IHU had 245 employees and an additional 249 dependents (either partners or children) covered in the institution's healthcare plan as same-sex domestic partners. In the wake of the Appeals Court decision, these 494 individuals were at risk of losing health insurance coverage through IHU's benefits plan. The IHU benefits office reported that in 2008, the average cost of healthcare benefits was \$7,149 per employee, \$6,134 of which was covered by the University and \$1,014 of which was covered by the contract holder. These figures, however, do not account for

the fact that all same-sex couples (unlike opposite-sex married couples) must pay federal taxes of up to 40% on employer-sponsored health coverage, bringing the actual family burden closer to \$3,466. Using these figures, health coverage costs gay couples at IHU approximately three times the amount paid by their heterosexual compatriots. In absolute numbers, the IHU health plan covered the largest number of employees and the largest dollar figure of any of the three universities in the study. (See Table 4.) At the same time, it should be emphasized that IHU is much better resourced than either of the other institutions in the study.

Three salient considerations undergird IHU's adaptation to the new policy environment in Michigan. Briefly enumerated, they are: IHU's history of support for and legal action related to diversity, its large number of employees, its elite academic status, its substantial financial resources, and the fact that there are no union coalitions on campus.

There is an historical tradition of support for the gay community at this campus. In 1971, two years after the Stonewall Rebellion, the university opened the nation's first support office for gay college students. In 1993, IHU regents approved the addition of sexual orientation to the institution's nondiscrimination policy. IHU instituted its domestic partnership benefits policy in 1995, in advance of many other institutions in the state, including those in this study. Therefore, central administration's words of support and encouragement were in keeping with the expectations of the IHU community when Proposition 04-2 passed. Here is one statement, issued by an executive administrator in central human resources:

The debate over this issue is ongoing with steady coverage in the media, and we recognize the strain such scrutiny and uncertainty can place on our lesbian, gay, bisexual, and transgender (LGBT) colleagues. It is important at this time that we remind ourselves and our colleagues of our continued commitment to each other and to the values of [IHU]. The benefits we offer are an important means we use as an employer to help recruit and retain the best faculty and staff nationally. They also reveal our principles and demonstrate our dedication to an inclusive environment based on respect and equity for all members of our community. Our intent remains consistent. We will continue to offer these benefits as we have for the past ten years, and, if challenged, we will vigorously defend our right to do so.

The President of the University, its Chief Human Resource Officer and its Provost all sent emails to the community affirming the institution's support for same-sex partner benefits, both as a means of recruitment and a method of inclusion. Over a period of two and a half years, IHU issued five emails to faculty and staff groups in response to the state constitutional amendment and its subsequent legal decisions. In between these announcements, three meetings were convened for employees with same-sex domestic partner coverage.

IHU was the second university to implement a new health benefits policy. Therefore, it had the opportunity to watch how NMWU had responded to the new regulatory context before crafting its own policy. In January of 2008, when the new benefits year began, IHU implemented the first of two interim policies.⁴⁸ Policy development was informed by its legal team who felt confident that benefits for domestic partners would be upheld in Michigan, just as they had been in other states.

⁴⁸ At IHU, individual staff unions negotiate directly with the administration. Its ODB policy was not subject to contract negotiations because it classified as a more inclusive category of dependent coverage than the institution's previous domestic partner policy. Because the new policy was exempt from negotiation, IHU's administration had more latitude in designing the policy than either NMWU or GLU had.

Ultimately, IHU's legal team misread the judicial temperament in Michigan. One key decision-maker describes the process this way.

Respondent: We had a conservative court. I thought that would work in our favor. I shouldn't say our favor. I thought that would work in favor of a strict construction of the statute because that's what conservatives are supposed to stand for. That's what they say they stand for. That same court had rendered decisions construing the Constitution very strictly.

And so when it came to actually reading in a fringe benefit prohibition into a marriage amendment I thought, you know, we can give them an argument very consistent with their conservative principles to rule in favor of the benefits. And so I don't know...

I could give you a cynical answer. Which is that it's a very political decision. And that's frankly the only answer I'm left with 'cause I don't know. But two courts did. I mean the Court of Appeals and the Supreme Court.

Interviewer: So what was the juncture at which you knew that this sort of strict construction was not going to work?

Respondent: When they rendered their decision. Not until we got that decision.

Interviewer: At the point of the Appeals Court decision?

Respondent: Right. But I still thought there was a shot at the Supreme Court.

Interviewer: Really? Even at that stage?

Respondent: I did. I did. I mean maybe I was just – I mean they take pride in looking at it *de novo*, meaning fresh. It was a question of law. There was no standard of review. They were taking a fresh look at it. And I mean maybe with 20/20 hindsight we should have said to ourselves, "No conservative court is going to rule in favor of same sex partner benefits," but every other court around the country had ruled in favor of those benefits.

IHU took the gamble that it could win in court. Consequently, the interim policies were narrowly crafted to create eligibility for same-sex partners, using financial and legal

criteria as a proxy for domestic partnership. (The administration knew it could save substantially in health care premiums if the court allowed it to continue with coverage under the more narrowly tailored policies, directed at same-sex partners only.) However, the university was forced to abandon the strategy when it became clear that the Michigan judiciary was determined to strike down any benefit policy that gave recognition to domestic partners or to same-sex couples. After the Michigan Supreme Court finalized regulatory policy on the issue, IHU capitulated and developed a broad eligibility scheme that covered both opposite-sex and same-sex partners, as had been done at NMWU and GLU. IHU recognized that the potential cost associated with opening the policy up to unmarried heterosexuals was necessary if it was going to maintain its elite academic status.

Ultimately, IHU stuck to its strategic vision: to maintain its recruitment edge by making itself an attractive employer to the broadest possible pool of candidates. By providing the same benefits that it had previously provided to same-sex couples and their families, IHU also hoped to retain the employees it already had. One member of the university legal team described the importance of health benefits to recruitment and retention:

There's not an employer out there that doesn't try to design its benefit plans to meet the needs of its employees. And healthcare, I mean healthcare is everything. Healthcare is the single benefit that people care the most about. That's what the research would indicate.

She goes on to describe the tensions between the demands of the market, cost and the need to design attractive benefits packages.

And so there's a constant effort to design our healthcare eligibility and offerings to meet the needs of our employees and that includes

recruitment and retention. So you have to look, you know, at who's here. But if we're not constantly recruiting key folks we're not gonna be who we are for very long. So we're constantly studying the market. We're constantly looking at our costs. We're constantly doing all of those things and trying to get just the right balance between all of them.

Though this respondent doesn't explicitly draw the link between diversity/inclusion and the ability to compete for talent in this passage, the IHU legal brief articulates the connection clearly. (See Chapter Seven for further discussion.)

Because of its strategic commitment to diversity, its deep pockets, and its desire to continue to dominate the recruitment landscape, IHU crafted the most inclusive policy of the three universities in the study. Under the terms of eligibility, six months of cohabitancy are all that are required for a same-sex (or opposite-sex) partner to access health coverage.

See the bar graph below for a comparison of DP benefits enrollments at IHU to the other universities in the study. Numerically, IHU stands out because of its large employee base. Size alone, however, cannot account for the fact that among the three institutions, it was the only one to lose same-sex couples in the wake of Proposition 2. After it switched to the ODB policy, IHU lost 15% or 37 of its same-sex partner enrollments.

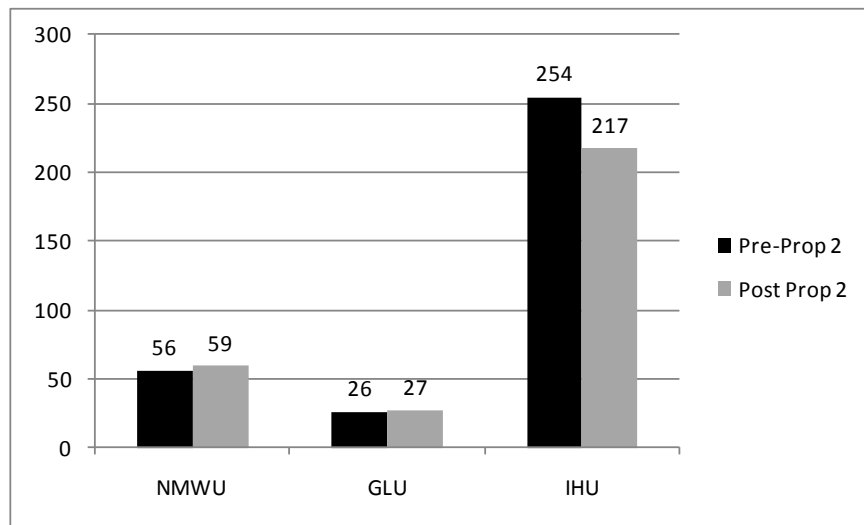
The qualitative data presented in this chapter suggest that this may be due to a variety of factors. Feelings of alienation and betrayal that the university's central administration did not take a strong or public stance on the issue of same-sex health benefits was present among gay faculty and staff. Gay faculty reported talking to

colleagues at other Michigan campuses and getting the sense that their institution was slow to react. This, in comparison to the proactive stance that university had taken in the recent past on other issues of social justice, particularly affirmative action, only compounded these feelings of frustration and resentment. The fact that IHU's legal team miscalculated the outcome of the case caused delays in communication, making IHU the slowest of the three institutions to finalize its ODB policy, adding confusion and uncertainty among an already fearful group of faculty and staff. A variety of organizational and other factors, including a large, decentralized campus may have exacerbated these feelings of alienation.

A Look at the Numbers: Benefits Enrollment Data

There is little institutional tracking of same-sex partners in higher education. However, most institutions do track employees who receive health benefits through their human resource offices. Therefore, in addition to conducting interviews with a broad array of actors inside and outside of higher education, I made data requests at each university in order to obtain health benefit enrollment numbers. The intent was to gain a better understanding of the recruitment and retention outcomes related to Proposition 2, particularly as they relate to same-sex partners. See Figure 5, next page.

Figure 5. Same-Sex Partner Enrollments pre-and Post Proposition 2



Before Proposition 2, universities in Michigan tracked the number of DPs enrolled in health plans by their employees. At that time, several cities in Michigan had domestic partner registries for either same-sex or opposite sex partners (Demian, 2010). However, using the logic that heterosexual couples had the opportunity to marry and access the health benefits of their spouses, all of the universities limited access to DP benefits to same-sex couples. Once the DP designation was overturned by the courts, they were compelled to switch to the ODB nomenclature. ODB policies, as defined in Chapter 1, are used by committed same-sex and opposite-sex couples to access health benefits for the partner of the university employee.

Table 4 (next page) provides a useful tool for examining the intended and unintended outcomes of Proposition 2 on the state's research universities. Because the numbers are small, the analysis is strictly descriptive. However, together with the larger qualitative study, it offers a useful means of evaluating the effectiveness of each

university’s organizational response. Table 4 displays frequencies of same-sex and opposite-sex benefit enrollees for each of the institutions in the study before and after Proposition 2. This time one/time two analysis gives us insight into the number of unmarried partners who are affected by university health benefits in Michigan. It also provides us with some clues about the effect of the new policy environment on university recruitment and retention of gay couples at each of the three institutions.

Table 4. All Enrollments in DP Benefits (pre-Proposition 2) and ODB Benefits (Post-Proposition 2) for Universities in the Study

	NMWU	GLU	IHU
Domestic Partner (DP) Enrollments			
Available to Same-sex Couples Only	56	26	254
Other Designated Beneficiary (ODB)			
Same-sex	59	27	217
Opposite-sex	8	11	217
Total	67	38	434
Change in Same-sex Partner Enrollments	5%	4%	-15%
Change in Total Enrollment pre-and Post-Prop 2	20%	46%	71%
Same-sex Partner Enrollments as a Ratio of Total Change in Enrollments	27%	8%	-21%
Opposite-sex Partner Enrollments as a Ratio of Total Change in Enrollments	73%	92%	121%

Source: GLU data is from the Faculty Union. NMWU and IHU data are from institutional Human Resource offices. Numbers include graduate student employees, faculty, staff and retirees.

Note 1: DP data from NMWU and IHU are from 2006, and ODB data are from 2009. GLU data are from 2005 and 2009, respectively.

Note 2: Because institutions implemented the new policies on different dates, ODB policies have been in effect for different periods of time. Each successive open enrollment cycle may contribute to the number of other designated beneficiaries covered by the institution. NMWU initiated the trend, followed by GLU and lastly, IHU. Therefore, employees at NMWU have had the most open opportunities to enroll for the benefits and employees at IHU have had the fewest. The cumulative effect of these enrollment opportunities is demonstrated in the row indicating changes in total enrollment pre- and post Prop 2.

Before and after comparisons at GLU and NMWU show small increases in the number of same-sex couples enrolled in health benefits. IHU shows a much larger decrease. Until more data is collected and made available, it will not be clear whether inter-institutional variance will be sustained over time or what factors (size, growth rate, institutional reputation, policy implementation date, etc.) are driving it. IHU's 15% decrease in the enrollment of same-sex couples stands in sharp contrast to gains in the enrollment of same-sex couples at GLU and NMWU. The drop of 37 same-sex partner enrollments also explains the aggregate drop in the sample. Negative feelings articulated by gay faculty and staff suggest that the IHU administration's handling of the issue may have had deleterious effects on the recruitment and the retention of gay faculty post-Prop 2. (See Chapter VII, section titled *Higher Education Politics Related to Sexual Diversity*.)

Increases in total enrollment across the three universities are due to opposite sex partners, indicating that the passage of Proposition 2 has primarily benefited unmarried heterosexual couples.⁴⁹ In this case "total enrollment" refers to time one/time two differences between DP policies and ODB policies (not total benefits

⁴⁹ In legal terms, ODB policies are available to individuals other than romantic partners (of either sex). However, since tenants, blood relatives and spouses are explicitly excluded, the number of other possible arrangements is limited. Patterns of usage indicate that it is very uncommon for anyone to enroll another individual as a beneficiary to their health insurance, unless they are involved in a committed, long term relationship with that person. It is very uncommon for anyone to enroll another individual as a beneficiary to their health insurance, unless they are involved in a committed, long term relationship with that person. The fact that the institutions in the study provided breakdowns in only two categories (same-sex partner and opposite sex partner) indicates that few, if any, individuals have been identified who fall outside of these two categories. That said, particularly as usage of the policies expands over time, it is possible that an "other" category will emerge.

enrollment at the university). There is some irony in this finding, since the intent behind the proposition was to create a sharper distinction between married and unmarried couples. IHU has the largest increase in total enrollment due to the new policy, followed by GLU and NMWU. Since there is no limit to enrollments⁵⁰, this finding suggests that enrollments at all three institutions are likely to increase over time until a saturation point is reached.

Because the universe of eligibility has been expanded to a group that was not previously covered—unmarried heterosexuals— increases in total enrollment indicate that ODB policies are likely to cost institutions more than the previous DP policies.

It is also important to note that structural inequities in the federal tax code mean that employers, as well as employees, pay more to offer health benefits to unmarried couples. The Williams institute reports that in aggregate, U.S. employers who assume these responsibilities pay an additional \$57 million dollars per year in payroll taxes (Badgett, 2007). These figures do not include unequal tax treatment at the state level.

To date, however, DP benefits at public universities have not been a drain on state budgets. This is mainly due to small numbers of enrollments, however data from the College and University Professional Association for Human Resources (CUPA) indicate that only 8 percent of all institutions pay all health insurance costs for family coverage (2009). Further, in some instances, the employer portion of domestic partner benefits is paid for out of private donations so that no state money is used (Russell,

⁵⁰ The only enrollment limit in the sample is at NMWU, where the graduate employee union is limited to 15 ODB enrollments.

2007). See the section in Chapter VII titled *Cost Containment* for further discussion of issues related to cost in the current context of fiscal austerity.

Chapter Summary

This chapter presents data from the three research universities in Michigan that provided the case examples in the study. The institutions are arranged in chronological order, starting with the institution that responded to the changes in the regulatory environment first and ending with the institution that responded last. The chapter also includes a descriptive analysis of secondary data collected from the human resource offices at each institution.

CHAPTER VII

THE LOGICS OF ENACTING SAME-SEX HEALTH BENEFITS WITHIN HIGHER EDUCATION

University Adaptation and the Interplay of Logics

Formal rules are constructed through a process of conflict and contestation (Powell & Dimaggio, 1991). In the case of Michigan's Proposition 2, the conflict over same-sex benefits results from inter-institutional tensions (e.g. faith-based beliefs versus state recognition of domestic partners), but also intra-institutional tensions within higher education. In this chapter, I focus on the institutional logics at work among universities in Michigan as they adapted to the state's retraction of domestic partner's access to health benefits offered by public employers.

Drawing on the theoretical framework presented in the first half of the paper, below I present the institutional logics extracted from the data. First, I define each of the logics, offer an overview of how they are instantiated and enacted among the three universities and at the level of the field and specify the organizational goals that are derived from them. The logics are: market logics, compliance logics, political logics and strategic logics. This atomistic presentation is given for the sake of analytic cogency and clarity. In reality, however, each of the four is contested, some hold greater sway in certain organizational environments than others, and all operate concurrently.

See Table 5 for an overview of the logics and institutional goals related to the provision of same-sex benefits.

Table 5. Logics and Goals Enacted by the Institutions in the Study

Category	Specific Goals	Institutional Dimensions
Market	Recruit and retain talent	Cultural/cognitive/Normative
	Contain costs	Cultural/cognitive/Normative
Compliance	Comply with State Constitution and Statutory Law	Regulative
	Negotiate union contracts	Regulative/Normative
Political	Navigate Politics related to Sexual Diversity	Cultural/cognitive/Normative
	Navigate Religious Politics	Cultural/cognitive/Normative
	Navigate State-specific Politics	Cultural/cognitive/Normative
Strategic	Support Racial Diversity	Cultural/cognitive/Normative
	Support and Inclusive Community for LGBT Employees	Cultural/cognitive/Normative

By elaborating each of the cases separately, and then extracting the four logics, I am able to embed the analysis first at the level of the university in question and then at the level of the organizational field (higher education). In order to situate the logics and their contestation in the historical, political and organizational context of each university, each case is presented separately in Chapter VI. Thus, readers who are interested in the big picture will find generalizable abstractions in this section; those interested in more nuanced variations in process should also read the case-by-case descriptions that preceded it.

Market Logics

In a study examining the determinants of executive succession in the higher education publishing industry, Thornton and Ocasio (1999) take pains to define what they call a “market logic.” A *market logic* is one in which “executive attention is directed to issues of resource competition and acquisition growth, and executive succession is determined by the product market and the market for corporate control” (Thornton &

Ocasio, 1999, p. 801). In their analysis, Thornton and Ocasio describe a fundamental shift in logics within the academic publishing industry; they characterize this shift as moving from the logic of viewing the industry as a profession to the logic of viewing it as a business. The authors point out that these changes occurred as a spike in supply-side demand took a hold of the publishing industry and were concurrent with an increased emphasis on marketing, management and strategic planning.

Similarly, higher education is an industry in the grip of market logics. Numerous scholars have charted the influence and pervasiveness of market influences in higher education organizations (e.g. Bok, 2003; Campbell & Slaughter, 1991; Graff, Heiman & Zilberman, 2002; Liebeskind, 2001; Rhoades, 1998; Slaughter & Rhoades, 2004; Washburn, 2005). Gumpert, in particular, offers a useful examination of two competing conceptions of higher education (2000). Her mapping of higher education as an industry built on the corporate model, juxtaposed against that of a social institution with a mandate to generate and disseminate knowledge, corresponds with Thornton and Ocasio's description of the shift from professional logics to business logics in the publishing world. Gumpert's work is built upon the assumption, shared by many, that market logics are alive and well among U.S. colleges and universities. In part, this is due to an explosive increase in demand for higher education, analogous to the one described above, which permanently altered the central operating logic of the publishing industry.

The analysis below is based on the premise that market logics, as defined by Thornton and Ocasio, function to various degrees among all higher educational

institutions. As decision makers and constituents grapple with the issue of same-sex benefits using market logics, other types of logics—compliance, political, and strategic—emerge to contest and complement them. Below, I describe two specific dimensions of the market logics public education institutions in Michigan use: recruitment and retention, and cost control.

Recruitment and Retention

The importance of recruitment and retention to institutional decision making about same-sex benefits was raised by 23 out of the study's 25 respondents.⁵¹ Not surprisingly, inter-institutional competition for faculty was the subtext of many of these comments. Thornton and Ocasio's definition of market logic refers to competition among organizations in the same industry as "issues of resource competition and acquisition growth (1999, p. 801)." The following statement expresses a sentiment shared by many executive administrators.

In terms of recruiting and retaining faculty in particular (it's true of staff, but less true) one needs to have HR practices that really are best practices, that really will recruit the kind of people that you're interested in recruiting—that you have to have to be successful. Having policies like [ODB], having same-sex domestic partner benefits. If we look at the institutions with which we compete, many of them have that. If we don't have that, fundamentally, we're at a disadvantage in terms of trying to get the talent that we need to have. So aside from goals and values and the like—which are at their core more important than the other issues—but aside from that, in order for [NMWU] to recruit the talent and to retain the talent, we were frankly at risk that faculty members that we had who are gay and lesbian would say, "I can't get benefits for my partner, I can't stay at [NMWU]. I'm gonna leave."

⁵¹ The only respondents who did not emphasize recruitment and retention were the two sponsors of Proposition 2.

The market logic of recruitment and retention was consistently and forcefully argued at each of the institutions in the study. Institutional decision-makers expressed these concerns in documents from internal emails to legal briefs and interview data. Even the face of potential political and legal backlash for reinstating some form of same-sex benefits, market logics compelled public universities to keep the recruitment and retention of faculty at the forefront as they adapted to the new policy constraint in Michigan.

Arguments based on market logics related to recruitment and retention are commonplace in higher education. However, the Michigan case is unique in that not one, but *two* exclusionary referenda were passed into the state constitution in the course of two years. The first was the same-sex marriage ban in 2004. The second was the affirmative action ban in 2006. The Appeals Court decision, in February of 2007, in which the court struck down domestic partnership recognition, meant that universities in the state were dealing with both issues simultaneously. While the affirmative action referendum received the lionshare of attention at all of the institutions, several decision-makers expressed deep concerns about the climate of intolerance that was building in the state as a combined result of the two sequential referenda. The following comment illustrates this theme:

It was two blows in a row to trying to get people to think of coming to Michigan as a place where it would be an inviting and welcoming place to work. And you've got the state passing laws that prospective employees say, "Why on earth would I want to come there?" That coupled with the financial climate in the state, it was a real challenge. We lost many prospective employees on the combination of those two laws passing. That was one of the reasons why we needed to move quickly and make

some decisions about what kinds of benefits we would offer and why we wanted to encompass as many people as we could within that program.

Concerns about the intolerant climate toward persons of color are not new in the state that witnessed the 1967 Detroit Rebellion. But the recognition that intolerance directed at gays and lesbians is related to and, indeed, part of the state's larger problem attracting talent reflects a change in the zeitgeist. Richard Florida's work demonstrates that populations of gays, artists and bohemians have a direct relationship to housing values and other locational variables (e.g., income or human capital), by making the places where they settle more attractive to other populations and demographics (2008). Florida attributes the attraction to two factors: an aesthetic-amenity premium and a tolerance or open culture premium:

Regions with large bohemian and gay populations possess low cultural barriers to entry, allowing them to attract talent and human capital across racial, ethnic and other lines. Artistic and gay populations also cluster in communities that value open-mindedness and self-expression. And, their status as historically marginalized groups means that artistic and gay populations tend to be highly self-reliant and receptive to newcomers. They've had to build networks from scratch, mobilize resources independently, and create their own organizations and firms. For all of these reasons, regions in which artists and gays have migrated and settled are more likely than others to place high premiums on innovation, entrepreneurship, and new firm formation. It's not that gays and bohemians drive up housing simply by paying more; bohemian and gay residents drive up housing value because they make areas that were already ripe for growth even more desirable, and to a greater number of people. (2008, p. 139)

Florida's analysis (contested though it might be) highlights the growing recognition that the contributions of gay and lesbian Americans are increasingly recognized as a vital part of an economically robust and diverse society.

An important subtheme on the topic of recruitment and retention, crosscutting each of the cases is the understanding that the recruitment advantage of same-sex benefits is one part symbolic and one part functional. As I proceeded through the interviewing process, it became clear that there are two strains of thought on the market value of benefits and their impact on recruitment and retention; one is that the impact is primarily symbolic, the other is that the benefits have real-world consequences, with demonstrable outcomes. In the quote below, a faculty respondent emphasizes *the image* that his university is cultivating by offering the benefits, rather than the *actual outcomes* that accrue to individuals and families as a result of such benefits.

It's a faculty recruitment issue, it's an image issue. We don't want to appear to be behind the times on these sorts of things. To the extent that they're concerned about benefits packages, it's more for a professional operations kind of thing -- you know, that this is what quality universities do... I mean I do think that the people would see it as unfair, but I don't know that that would have been the initial impetus. I strongly suspect that as long as [IHU] and [NMWU] has a benefits package like this, [GLU] will have a benefits package like this.

But for many of the gay faculty and staff in the study, the pragmatic aspect of being able to provide health benefits to their partners and family members was paramount. One faculty respondent at another university shared a personal narrative that reveals the extremely functional nature of same-sex benefits. In it, she refers to her first faculty job and to a trailing partner—a common phenomena among academic couples—who was coming from an eastern state. The description of the joint decisions she and her partner made in her early career underscores the importance of public policy differences among

different states and the impact that access to health benefits can have on recruitment and retention:

[My state], at the time, did not have same sex marriage but widely recognized domestic partnerships. My partner was working at [University], which actually has Affirmative Action for gay and lesbian people, like they actually include it in, not just non-discrimination, but Affirmative Action.

So we were coming from a good situation. Now the faculty job I got first was in the south... Bible Belt, no domestic partner benefits at the time. Barely non-discrimination. It was very much a Southern experience.

I had a couple of other job offers even farther in the South. So that's the one I took, and my partner did not move there with me. There was no intention of ever doing that. So we commuted for two years there, and the first year I was there I looked for jobs.

The critical take-away from this excerpt is that this particular gay woman and her partner were not willing to live, for more than a year or two, in a state that denied them the cultural and material benefits they could find elsewhere.

Domestic faculty recruitment is one issue; the recruitment of international faculty is yet another. Several respondents in the study contrasted the laws and relationship benefits available in their home countries to Michigan's retraction of relationship rights for same-sex partners. One faculty respondent spoke of his Canadian citizenship, referring to the fact that gay marriage and health insurance for partners and children is readily available in his home country, saying "I wouldn't give up my Canadian citizenship, because it's been a kind of, 'Gee, if things really head South in this country...'" A kind of safety valve. I know I've got that option, and I'm not about to give that up." Another respondent, from South Africa, expressed his disappointment about the passage of the marriage referendum and its subsequent interpretation.

I came to the U.S. from South Africa for many reasons. One of them was I thought this would be a society that would be more accepting. And it made me question the sanity of that decision. South Africa is an extremely religious, morally conservative society. But three years ago in South Africa, they passed same sex marriage – the whole country. So at roughly the same time, this went down in Michigan -- Prop 2. So I was at the point [of] really wondering if I did the right thing to come to this place where I thought it would be better. And it didn't feel (at that point) like it was any better.

These latter excerpts reveal the symbolic and material dimensions of recruitment and retention issues. There is little doubt that if the universities had not found legal recourse to provide benefits to same-sex partners, many of these gay and lesbian faculty would currently be searching for work elsewhere.

Cost-containment

Efforts in cost-containment have become an everyday fact of life for American public colleges and universities. Higher education has suffered declining state and federal subsidies for three decades (St. John, 2006), and has most recently been devastated by the country's recession. While Michigan's public universities have not suffered from furloughs or other high profile examples of fiscal austerity that have stricken public education systems in California and elsewhere, they have, nonetheless, suffered from significant reductions in public expenditures and endowment levels. Between 2003 and 2008, per-student state appropriations for higher education fell 23 percent. According to the State Higher Education Executive Officers, this was the biggest decline in the nation during the time period (Kelderman, 2010).

Simultaneously, higher education institutions in Michigan have been stretched thin by astronomical increases in the cost of health care (College and University

Professional Association for Human Resources, 2007; Hendry, 2009; June, 2003; Lively, 2000; Smallwood, 2001). One estimate puts the national rate of increase at 49% between 2000 and 2005 (Hewlett, 2005). Another study indicates a 59% increase in employer-sponsored health insurance premiums for family coverage between 2000-2007, compared to wage growth of 12% and inflation of 10% (Kaiser Family Foundation and Health Research Educational Trust, 2004). A longitudinal survey by the College and University Professional Association found that between 2008 and 2009, median annual plan premiums increased at a rate of 11 percent or for employees and 14 percent or for employee-plus-family coverage (College and University Professional Association for Human Resources, 2009).⁵² The same report found that employer contributions continued to rise at a higher rate than those of individual contributions (College and University Professional Association for Human Resources, 2007), demonstrating that while institutions are increasingly employing cost-sharing strategies in this arena, they continue to assume a large portion of the market-based health care increases.

Moreover, institutions of higher education, like other employers who offer health benefits to unmarried partners pay substantial federal and state payroll taxes that are not levied for spousal coverage. The Williams institute reports that in aggregate, U.S. employers who assume these responsibilities pay an additional \$57 million dollars per year in payroll taxes for unequal federal taxes alone (Badgett, 2007). These figures do not include unequal tax treatment at the state level.

⁵² These figures put 2009 median annual plan premiums for employees at \$5,176 and for employee-plus-family-coverage at \$13,996 (College and University Professional Association for Human Resources, 2009).

After the passage of Proposition 2, and against this backdrop of increasing higher education costs and fiscal austerity, Michael Cox, the Attorney General for the state of Michigan, communicated his approval of a “plus one program” that would allow all employees to pick one other person that they wanted to cover under their health insurance plan who would not have to be the spouse of the employee. In its 2007 decision, the Michigan Court of Appeals left the door open to this interpretation. One university General Counsel described this turn of events and the way it was received at his institution:

One of the things that the attorney general suggested, and that was cited in the court’s decision or at least envisioned by the court’s decision, was that universities could do a plus one program and that would be legal. Everyone gets to pick one person that they want to put on their benefits, and that was not financially possible for NMWU to do. So our rationale was to try to find a legal way to provide benefits that would continue to cover those who had been covered under the old plan but be broad enough that it would still be constitutional.

NMWU was not the only university of the three that considered the potential cost of a “plus one program” to be prohibitive. In court, attorneys from another university used cost as the basis of an argument for the continued recognition of same-sex partnerships for benefits purposes. Ultimately, however, the court decided that *any* recognition of same-gender partnerships violated the intention of Proposition 2. Thus, in crafting a new eligibility scheme that would comply with the law, universities had to find a way of offering benefits that were a) not contingent upon a relationship that looked like marriage, and b) not contingent upon the gender of the person being enrolled.⁵³ For

⁵³ In May of 2008, the Michigan Supreme Court ruled that the state’s ban on same-gender marriage made it illegal for public universities and other state-run institutions to provide domestic partner benefits to the

their own purposes, they also had to design a new benefits eligibility program that was not prohibitively expensive.

All of the university administrators in the study expressed concern about limiting the financial exposure of their institutions.

Cost of benefits is always a consideration. I was here when we first offered same-sex partner benefits, and so “what we absolutely know and what we knew all along” is how I like to put it... we don’t know who’s out there.

When we first offered same-sex [DP] partner benefits we were sort of kind of one of the first. You could look at other data. You could say “What do other employers do, what’s been their experience?” But you really don’t know what your experience is going to be until you put your eligibility criteria out there and people start electing it.

Under the previous DP policies at all three universities, unmarried heterosexual couples had been excluded from eligibility because of the potential increase in cost to the institution. (At the time, the rationale that was used was that unmarried heterosexuals always had the option of getting married and gaining to access spousal benefits.) However, projecting the cost of the new OBD policies was difficult. While it was possible to calculate the numbers of same-gender couples who would opt for the benefits, there was no sure way of knowing how many unmarried heterosexual couples would also opt in. One projection, based on census data and issued by one university in

partners of gay employees. “Writing for the majority, Justice Stephen J. Markman said that while those favoring benefits argued that Michigan’s ban on gay marriages applies only to marriage, it in fact also covers any “similar union.” Just because a university doesn’t declare partners to be the same as married couples doesn’t mean that the partners aren’t being accorded such recognition, the decision says. The decision goes on to say that marriages and domestic partnerships are unique in Michigan in that both are defined in part by gender and that blood relatives cannot enter into them together. As a result, these relationships are similar, the court says. Notably, the new benefits arrangements set up by universities do not feature gender limits of any kind, although they do have measures that would bar blood relatives from registering for benefits in that way.” (Jaschik, 2008b).

the study, was that the new ODB policies would lead to as much as a 3% increase in total benefits enrollment. The primary concern was that expanding eligibility rules to include unmarried heterosexual couples might result in a substantial increase in benefits enrollments.

Consequently, universities in Michigan developed several strategies for simultaneously complying with the new regulatory environment and limiting their cost exposure. The primary method of limiting institutional exposure to greater health insurance costs was the implementation of exclusionary eligibility criteria related to the length of cohabitation. A secondary method was implementing exclusionary criteria related to the age of the benefit recipient. A tertiary one was instituting a “first come – first served policy” and placing a cap on the number of employees who were able to enroll for the benefits. (Specific criteria vary among the universities, and are discussed in more detail under the individual case descriptions.) By all accounts, these eligibility restrictions were built in as safeguards against prohibitive cost increases.

An important consequence of these cost containment strategies, however, was to restrict access to same-gender partners who would have had access under the previous DP policies. At NMWU, for example, the institution’s former DP policy required a cohabitation period of six months; by contrast, its current ODB policy requires a cohabitancy period of 18 months. In addition, NMWU also instituted a cap on the number of graduate student employees who could enroll an unmarried partner in the health benefits program. Another example can be found at GLU. That institution’s former DP policy required a cohabitation period of six months; by contrast, its current

ODB policy requires a cohabitancy period of 18 months and an age requirement of 26 years. These additional restrictions do not apply to heterosexual couples who decide to wed and to access spousal benefits. Thus, one of the effects of Proposition 2 in Michigan has been to further restrict access to healthcare for same-gender couples, while expanding it to unmarried, but cohabitating, heterosexuals. See Table 3, Chapter Six, for data demonstrating an aggregate decline in the number of same-gender partners with health benefits among the universities in this study. Data from this study also indicate that the vast majority of new benefits enrollments at each of the three universities have come in the form of heterosexual partnerships.

Another form of caution exercised by the universities was to institute the new ODB programs as pilots, so that they could modify eligibility criteria as necessary. One attorney, who argued against Proposition 2 in court on behalf of a Michigan nonprofit group, noted the relationship between cost concerns and implementation of pilot programs:

Most of these employers, basically their response was look, we can't afford to allow people just to cover one other person they want to-- it'd just be too many people. So we have to narrow that pool of people, and many of the universities were only willing to do this as like a pilot project, to see what the actual cost was going to be.

What they found was it wasn't a significant increase in costs. In fact, it was almost the same, sometimes it was a little bit more, but it wasn't something that was gonna break the bank. But they were very hesitant...

In fact, in each of the three cases in this study, institutions have since removed the pilot nomenclature. This development suggests that institutional concerns about cost – while

grave at the onset – have receded somewhat. The attorney’s account (above) is corroborated by a General Counsel at one universities (below).

We’re fortunate that to date any additional cost has been extremely marginal. I think we’ve had maybe two people, four people sign up for this beyond the people who were previously signed up under our old plan. So we really haven’t had much of a cost but there can be a cost, a financial cost.

I think our view was the benefit in order to recruit and retain employees outweighed that cost. It also helped us live up to a commitment that we had made to employees, valued employees, and we didn’t want to have to go back on that commitment. And it also helped us live up to our institutional values.

So I think all of that together is a benefit institutionally to us and why we stood behind that decision and now why we’ll take the “pilot” off of that program and make it a regular program.

It should be noted, however, that long-term projections may not yet be possible, because it is unclear how many unmarried heterosexual couples will begin to take advantage of OBD policies as the cost of healthcare continues to rise. Of less concern, but still important, is whether a reduction of stigma will lead to long-term increases in same-gender benefits enrollments. One study shows a modest (.05%) increase in cost due to this type of policy (Russell, 2007).

The Logics of Compliance

Webster’s Third New International Dictionary defines compliance as “conformity in fulfilling formal or official requirements” or “cooperation promoted by official or legal authority or conforming to official or legal norms” (1986). In new institutional theory, the role of the state is emphasized as a critical force in shaping organizations and the

closed system approach, previously favored by sociologists, is rejected (DiMaggio & Powell, 1983; Meyer & Rowan, 1977). Dobbin and Sutton, for example, posit that because legal terms of compliance are often unclear, organizations commit considerable resources to the development of compliance measures. Elsewhere, they note that the state changes rules frequently in response to litigation and political negotiations, enforces rules in a fragmented way and issues ambiguous mandates (1998). Ultimately, they argue that the failure of the state to assert its authority results in the development of compliance rationales that are located in the legitimacy of the market—rather than that of the state (Dobbin & Sutton, 1998). Scott describes the regulatory environment as one of the three principle “pillars” of institutions, and argues that while compliance is most closely related to structural, economic and legal considerations, it also overlaps with normative concerns (2008, p. 50).

The 14th Amendment and Anti-discrimination Law

What were the structural conditions and government logics that set the stage for the passage of Proposition 2 in 2004? Why didn't Michigan's public universities enter the battle over same-sex benefits prior to the Michigan Court of Appeals case in 2007? In order to begin to answer these questions, it is first necessary to understand the basics of federal antidiscrimination law.

Constitutional rights have historically been extended in a line from majority to minority populations. I begin with a brief review of the protections offered by the 14th Amendment. In 1868, Congress' passage of the 14th Amendment enshrined preventative measures designed to prevent discrimination based on race in the

Constitution. Perhaps the most far-reaching article of the amendment includes the Citizenship and Due Process Clauses, which grant citizenship to all persons born in the U.S. and prevent individual states from abridging or denying the civil and political rights of the citizens within their borders. After the Civil War, there was no consensus as to whether or not blacks should be considered full citizens. In fact, Congress' passage of the 14th Amendment was a strategic maneuver designed to prevent the Supreme Court from overturning the Civil Rights Act of 1866, passed into law two years earlier. In other words, the Citizenship Clause, very importantly, served as the basis for the reversal of the Dred Scott decision and the normative basis of contemporary law, in which black citizens are fully recognized with the attendant host of rights and liberties that were, before 1866, only afforded to white citizens. The second relevant section of the 14th Amendment is the Equal Protection Clause. Proving that the law and the Constitution are always subject to judicial interpretation, the Equal Protection Clause served first as the genesis of the separate but equal doctrine which dominated United States law for half a century, before becoming the basis for its reversal in *Brown v. Board of Education of Topeka* in 1954. Thus, it is no exaggeration to say that the 14th amendment *itself* is historically contingent upon our country's reliance on slavery and a system of structural and legal discrimination against African Americans.

Two weeks before the landmark *Brown v. Board of Education decision*, Chief Justice Earl Warren's court issued a decision in the equally important case of *Hernandez v. Texas*. Hernandez was a Mexican American fieldhand who murdered his employer after a hostile exchange at a local cantina. Because of widespread, Jim Crow-style

discrimination against Mexican Americans in the 1950s, Hernandez was unable to get a fair trial. In its reasoning, the court recognized that Mexican Americans, as a group, existed as a “class apart” that did not fit into a legal structure that recognized only black and white citizens. In a description of the Mexican American attorneys who succeeded in taking the case all the way to the Supreme Court, University of California-Berkeley Professor of Law Ian Haney-López said: “They took a gamble. They knew, on the up side, that they could win national recognition for the equality of Mexican Americans, but they knew, on the down side, that if they lost, they would establish at a national level the proposition that Mexican Americans could be treated as second class citizens” (WGBH, 2010). In its decision, the Warren court conceded that Hernandez should have the opportunity of a new trial with a jury of his peers, and that Mexican Americans *as well as members of other racial groups*, were entitled to the same protections that white and black citizens received under the 14th Amendment. While its protections were later extended to women as well, the 14th Amendment’s most stringent standard of review still applies to governmental discrimination on the basis of race.

At the same time that the 14th Amendment laid the cornerstone for dismantling racial discrimination, it codified some forms of legal discrimination against women. For the first time in history, the word “male” was added to the U.S. Constitution – and its placement in the second article of the 14th Amendment ensured that women of all races would wait 70 years before gaining suffrage. Over the course of the next century there were myriad cases in which women and their counsel argued for the application of the 14th amendment to sex discrimination. However, it wasn’t until more than 100 years

after passage that its protections were extended to women. Even now, an intermediate (rather than strict) level of scrutiny applies to constitutional challenges of equal protection and sex discrimination. Strict scrutiny is the most stringent standard of judicial review used by American courts. For all discrimination issues related to race, national origin or fundamental rights a level of strict scrutiny applies—meaning that the government must show that the challenged classification serves a compelling state interest.

Thus, the 14th Amendment serves as the Constitutional basis for protections against discrimination based on race, national origin, gender and fundamental rights. It is also the basis of the most fundamental legal distinctions between discrimination related to race, gender, and issues of sexual orientation. Protections against group-based stereotyping, like the bulwark against racial stereotyping built into the 14th Amendment, do not exist for gay and lesbian citizens. This is why all eyes are on *Perry et al v. Schwarzenegger et al* (California's same-gender marriage ban) as it winds its way toward the Supreme Court—like *Hernandez v. Texas*, it has the potential to extend the Equal Protection clause to millions of Americans. And, also like *Hernandez v. Texas*, it has the potential to codify the second class citizen status of gay and lesbian Americans for decades to come if Proposition 8 is upheld. The fact remains that there is not yet acknowledgement of the violent history of oppression that gays and lesbians have faced in our country nor the consensus that it needs remediation—and, as a consequence, the line of doctrine and precedent that are used to protect against racial discrimination (and to a lesser extent gender discrimination) are absent for sexual minorities.

Since the early 1990s, however, there have been a series of cases that challenge state's rights to intervene in their citizens' sexual activities. In *Planned Parenthood v. Casey*, Justice Kennedy set forth the constitutional protection of personal autonomy provided by the 14th Amendment: "Our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education... Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do" (Sedler, 2003, p. 985). Similarly, in *Romers v. Evans*, the Supreme Court struck down a constitutional provision in Colorado that deprived gays and lesbians the protection of the state's anti-discrimination laws. In both of these cases, the Court ruled that class-based legislation directed at gays and lesbians was a violation of the Equal Protection Clause.

In 2003, the Supreme Court overturned its earlier ruling in *Bowers v. Hardwick (1986)*, upholding a Georgia law that prohibited oral and anal sex. The case in reference is *Lawrence v. Texas*, and it is important for two reasons. First, it established the right of consenting adults to sexual intimacy under the Due Process Clause of the 14th Amendment. Second, it established that whether a practice is viewed as immoral (or not) is insufficient reason to uphold a prohibition against it. Thus, *Lawrence v. Texas* removed moral disapproval as a permissible justification for the discriminatory treatment of same-gender couples – a critical point, since this is the justification that has traditionally been used to prohibit non-heterosexual behavior and to ban same-sex marriage. In a dissenting opinion in the case that *Lawrence* overturned, Justice Stevens wrote "the fact that the governing majority in a State has traditionally viewed a

particular practice as immoral is not a sufficient reason for upholding a law prohibiting that practice.” If we wonder at his perspicacity, we need only consider that the anti-miscegenation laws, which lingered in the South as late as 1967, were justified in exactly the same manner and ultimately struck down by the Supreme Court, as violating the Due Process and Equal Protection Clauses of the 14th Amendment. Thus, the reversal of *Bowers v. Hardwick* reveals areas of overlap between the extension of constitutional rights to persons of color and efforts to extend a similar line of constitutional rights to gays and lesbians.

Parallels between anti-miscegenation law and bans on same-sex marriage are well founded and well documented.⁵⁴ In fact, equal protection arguments based on *Loving v. Virginia* (the case in which the Supreme Court struck down the anti-miscegenation laws) are likely to be the basis of a future debate on the topic of same-sex marriage at the U.S. Supreme Court. Recently, David Boies and Ted Olson (opposing council in *Al Gore v. George Bush*) joined forces to represent plaintiffs in the case against California’s Proposition 8. Boies, a liberal, and Olson, a conservative both believe that the right to marry is a fundamental right guaranteed by the Equal Protection clause of

⁵⁴ See Peggy Pascoe’s history of anti-miscegenation in the U.S. for more comparisons between the two topics. Pascoe writes: “We are in the midst of an attempt to ground a category of discrimination in the fundamental social bedrock of marriage law. I would argue that it is virtually impossible to understand the current debate over same-sex marriage without first understanding the history of American miscegenation laws and the long legal fight against them, if only because both supporters and opponents of same-sex marriage come to this debate, knowing or unknowingly, wielding rhetorical tools forged during the history of miscegenation law. The arguments white supremacists used to justify for miscegenation laws—that interracial marriages were contrary to God’s will or somehow unnatural—are echoed today by the most conservative opponents of same-sex marriage. And supporters of same-sex marriage base their cases on the equal protection clause of the Fourteenth Amendment, echoing the position the U.S. Supreme Court took when it declared miscegenation laws unconstitutional in the case of *Loving v. Virginia*.” (Pascoe, 2004).

the 14th Amendment. Olson carefully points out that he and Boies are not advocating for a new or special class of marriage on behalf of their clients:

We're not advocating any recognition of a new right. The right to marry is in the Constitution. The Supreme Court's recognized that over and over again. We're talking about whether two individuals who will be -- should be treated equally, under the equal protection clause of the Constitution. The same thing that the Supreme Court did in 1967, which recognized the Constitutional rights of people of different races to marry. At that point, in 1967, 17 states prohibited persons from a different race of marrying one another. The Supreme Court, at that point, unanimously didn't create a new right, the right was the right to marry; the Supreme Court said the discrimination on the basis of race in that instance was unconstitutional...

There are certain rights that are so fundamental that the Constitution guarantees them to every citizen regardless of what a temporary majority may or may not vote for... Nobody's asking to create a new constitutional right here. This is a constitutional right that has already been well recognized by the Supreme Court. And what the Supreme Court has said is that even a democratic-elected legislature in Wisconsin cannot decide by majority rule that marriage scofflaws—people who don't pay their child support, who abuse their children, abuse their wives—cannot get remarried again. They said marriage is so fundamental that you can't take it away, even for people who have abused an initial marriage. Missouri, the legislature, democratic-elected legislature voted majority rule, overwhelmingly, that imprisoned felons could not get married. Supreme Court says, "No, even though they can't live together, they can't be together, marriage is such a fundamental human right that you can't take that away. (Moyers, 2010)

Indeed, 9th Federal District Court Judge Vaughn Walker agreed -- striking down California's ban on same-sex marriage as violative of the Equal Protection Clause of the 14th Amendment. In his decision, Walker cited *Loving* and noted that in order to uphold a discriminatory law such as Proposition 8 the government must demonstrate a compelling interest – which it did not.

Justice C.J. Marshall notably referred to *Lawrence* in the 2003 decision upholding Massachusetts' gay and lesbian citizens' right to marry in *Goodridge v. Department of Public Health*.

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define the liberty of all, not to mandate our own moral code."

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.

With this decision, Massachusetts became the first of five states, along with the District of Columbia, to grant marriage licenses to same-gender couples (HRC, 2009). Decisions such as *Goodridge* continue to create legal ripples across the nation, particularly in states with bans on same-gender marriage. This was recently the case in Texas where the State Attorney General has sought appeals in two cases where two district courts have granted divorces to same-sex couples who were originally married in Massachusetts. The divorce of two men was overturned by an Appellate Court in August of 2010, and has since been reappealed by the plaintiff. In another case, two women who sought a divorce were granted it by a court in Austin; that case also awaits appeal (Stengle, 2010).

There is currently a morass of litigation related to gay civil rights working its way through the courts: gay parenting and adoption, same-sex marriage, hate crime protection, employment rights, the Employment Non-discrimination Act (ENDA), the Defense of Marriage Act (DOMA), and Don't Ask Don't Tell (DADT), among others. Some legal experts, such as Ted Olson and David Boies,⁵⁵ believe that the surest route to this extension of rights will come through the Equal Protection Clause of the 14th Amendment (Moyers, 2010). Others believe it is more likely to come via the Due Process Clause, and that eventually the two clauses will reinforce each other— much as they currently do for racial and ethnic minorities and women. In either case, the extension of rights to gays and lesbians, when it does come, will come from doctrine and precedent—or fundamental and established constitutional law (Sedler, 2003).

The constitutional aspect (as opposed to the statutory aspect) of the difference between constitutional protections against other types of discrimination and the lack of precedent related to same-sex marriage has been strategically exploited by groups that wish to deny the extension of rights to gay and lesbian citizens. By enacting constitutional bans in addition to passing legislation, opponents of same-sex marriage have creating a public policy climate in which the regress of rights, rather than the extension of rights, has become the basis of the law. Absent a Supreme Court ruling overturning one of the states' same-sex marriage bans, this erosion of rights is likely to continue.

⁵⁵ Theodore Olson and David Boies (of *Bush v. Gore* fame) have joined forces to provide lead counsel for the plaintiffs in *Perry v. Schwarzenegger*, the high profile lawsuit against California's Proposition 8.

Case Law related to Marital Status and Health Benefits

Many discriminatory and exclusionary laws against sexual minorities—from prohibitions against same sex marriage to school bullying to employment discrimination -- are, at the present time, perfectly legal. Thus, litigating cases related to sexual orientation is currently a risky business because the law in this area is unsettled. This risk factor was taken into consideration by the universities in the study. As a consequence, none of the briefs filed by the public universities in this study framed the issue of same-sex health benefits in terms of discrimination against gays and lesbians. Instead, in each of the briefs filed by the universities, a narrow legal argument was crafted based on the university's constitutional autonomy and its right to maintain the personnel policies it needs to recruit and retain a competitive workforce.

IHU's general counsel explained the legal difficulty (and surprise) of dealing with Michigan's new regulatory environment in this way:

In all other circumstances, as employers, we have been able to design benefit and overall compensation programs. I mean benefits is one piece of an overall compensation program, and designing comp programs is very complicated. And to have been told that there's a group of people who *we can't offer a benefit to* was a challenge. It was really a challenge to work with because we're all used to dealing with sort of discrimination where it's sort of the flip side right? "Gee, you did not extend this benefit to somebody and you should have." I mean that's sort of how your discrimination law works. This turned it on its head and said "You offered this benefit to a group and that's not allowed."

This respondent's comments indicate that legal logics related to discrimination law presaged a separation between the right to marry and an employer's right to offer health benefits. In this case, clearly, the university's attorneys were confounded by the

2007 Michigan Court of Appeals decision. (See the section on Political Logics for a discussion of the politics of the Michigan judiciary.)

NMWU legal counsel, by contrast, seemed more tuned in to Michigan's judicial landscape. Rather than focus on compensation programs and the constitutional autonomy promised in the 1st amendment of the U.S. Constitution and in Michigan's Constitution, officials at that university developed its ODB policy to conform with the suggested "plus one program" of the state attorney general. One executive administrator characterized the compliance logics of his university in the following way:

There was an attorney general opinion that signaled that if you could construct something, whether it's a benefit or other purpose, that is not marriage-like, then have at it. So to the extent that creative, smart people want to think about ways that we can provide benefits to attract the best, you're gonna do that. And what it meant for us is okay, you certainly know that you cannot have domestic partner benefits. You are not going to do anything that violates the law. You are not gonna create criteria that could be interpreted as marriage-like, and you want to increase the likelihood that you're not going to open the door to whether it's legal liability, but certainly monetary, significant cost to the institution, especially now.

By contrast, amicus briefs written by gay and lesbian organizations in the state relied on arguments that underscored the difference between marriage (with all of its attendant rights and responsibilities) and health insurance, which is solely a contractual arrangement between employer and employee. In its brief, written on behalf of Kalamazoo School District employees who had seen their same-sex partner health benefits retracted in the wake of Proposition 2, attorneys for ACLU Michigan wrote:

A court would have to distort the plain meaning of marriage beyond all recognition to equate the voluntary provision of health insurance to same sex domestic partners with recognition of a "marriage or similar union." As is commonly understood, marriage confers hundreds of legal

rights, benefits and obligations in a broad array of contexts. As one court has said, the “benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.” *Goodridge*, 798 NE2d at 955. In contrast, providing health insurance for employees’ same sex partners is a very limited benefit.

Building upon this foundation, the ACLU brief referenced nine other states, in which courts had denied interpretations linking same-sex marriage bans to the denial of access to publicly sponsored health benefits. Examples include *Lowe v. Broward County* in Florida, *Devlin v. Philadelphia* in Pennsylvania and comparable cases in New York, Washington, Illinois, Maryland, Colorado, Massachusetts and California (ACLU, 2005). In the end, however, neither the universities’ argument based on autonomy nor the broader rights-based argument by the ACLU prevailed in the Michigan courts.

Union Contracts

Unionization among faculty and other members of the academic workforce has increased over the last several decades, particularly at public colleges and universities (AAUP, 2005; National Center for the Study of Collective Bargaining in Higher Education and the Professions, 2006), where unionization is viewed as viable strategy in the face of corporatization and restructuring (Rhoades, 1998). In fact, unionization rates among faculty are greater than that of workers in private sector and the general workforce (Rhoades, 1998). In the U.S., there are more than 375,000 faculty members and graduate student employees with union representation (National Center for the Study of Collective Bargaining in Higher Education and the Professions, 2006). The AAUP writes: “Unions have proven effective in struggles to defend tenure, protect academic

freedom and secure a sufficient degree of economic security to make the profession attractive to men and women of ability” (AAUP, 2005). In fact, collective bargaining activities by unions were the primary reason that, by the 1960s, a majority of Americans received health insurance coverage through their employers (Brownlee, 2007).

From the union perspective, collective bargaining provides a way to secure contractual, legally enforceable claims on college administrations, increase faculty involvement in the decision-making process, heighten political leverage, and protect faculty and other members of the academic workforce who might otherwise be unable to safeguard their working conditions (AAUP, 2005; NEA, n.d.). From the university’s perspective, collective bargaining is generally viewed in negative terms because it reduces managerial discretion and introduces a legal obligation to negotiate (Rhoades, 1998). But once unions are established, negotiating salaries and benefits becomes a necessary cost of doing business for colleges and universities. Though not often viewed as such, collective bargaining is also efficient; it permits contractual arrangements for large numbers of employees and contributes to perceptions of organizational legitimacy.

From the standpoint of organizational theory, the important point is that collective bargaining on health benefits fixes them at a certain level for a large number of employees and, in so doing, creates a norm at the institution. Norms specify how things should be done; they designate legitimate means to pursue valued goals and objectives (Scott, 2001). Gary Rhoades, for example, discusses the use of past practice provisions in his study of 212 collective bargaining agreements (1998). Such contractual

provisions “are a strategy used by union negotiators to ensure some recognition of pre-existing terms of faculty labor” (Rhoades, 1998, p.14).

In two of the cases examined in this study, unions were highly influential in securing access to health benefits for same-sex partners and children. At each of these campuses, unions formed coalitions through which to negotiate a standard package of health care benefits for their members. A union director at one university described the contractual relationship between the university and the faculty union.

There’s a national organization and they have services that support collective bargaining, so in our unit we actually negotiate wages, hours, working conditions within a contract that outlines certain benefits. So they—our administration—is legally obligated to meet with us and to bargain over certain things, and they can’t just eliminate a benefit. They have an obligation to negotiate.

Coalition bargaining agreements at both universities included provisions for domestic partners, prompting expectations that the universities would continue to offer the benefits in subsequent contract cycles. Unlike collective bargaining, coalition bargaining involves multiple unions reaching a certain percentage agreement on a particular issue or provision (U.S. Legal Definitions, n.d.). It adds clout to the union position in the bargaining process and prevents individual unions from bargaining against one another, and it is often perceived dimly by employers for just these reasons.

In February of 2007, the Michigan Court of Appeals ruled that Proposition 2 precluded public employers from offering health insurance to domestic partners. The same union director quoted above, said:

Well, you know, I remember when the court decisions came I was working here. So we were getting—our members were calling quite upset, and so I had—I called [name of man] and...

Interviewer: You're sort on the front line in that sense, aren't you?

Respondent: Yeah. And people were scared. They didn't know what was gonna happen and so I had, you know, I was just sort of—we decided as a union to give the administration an opportunity, to see what they were gonna do. I know the AFT was involved politically in trying to protect rights for state employees and doing work for their lobbyists in Lansing... they were on top of it. They were giving us bulletins about what was happening, and I was getting information from AFT Michigan. So I was able to convey to people sort of what was happening in the courts and explaining who the—to me—the bad guys were.

Due to the fact that union contract cycles are typically several years in length, public employers were required, by law, to honor domestic partner benefits between the court decision and the expiration of each contract. However, when the time came for contract renewal (staggered across campuses and among individual unions and coalitions), the universities were faced with the choice of replacing the old domestic partner designation with a new definition that would bring union benefits into line with those of non-represented employees, watering it down or abolishing it altogether. In each case except one (see case description of NMWU and its contract with the graduate student union, p. 41), the universities in the study offered unions and coalitions the same health benefits they offered to non-represented staff. The manner in which the major contracts were negotiated, and the details of the exclusionary clauses that were inserted, provide compelling evidence that union bargaining served as an important mechanism for the continuation of health benefits for same-sex partners and staff.

Though NMWU was the first of the universities to develop and implement an OBD policy that complied with the new regulatory environment, the university ran afoul

of its graduate student union in negotiations over benefits. It is the only institution in the study that imposed a cap on the number of benefits packages it made available. The cap was justified as a cost-saving measure by the administration, but its rationale was challenged along with the precedent it set for future negotiations. The following passage is an excerpt from a faculty newsletter:

Many of you will also know that the negotiations with the [graduate student union] on this issue were not smooth. [ODB] benefits were not originally put on the bargaining table by the administration. The [graduate student union] successfully bargained for them, but won them only with a provision that limited the number of employees who can register for them. The administration justified this cap by arguing that, with the extension of these benefits to unmarried opposite-sex partners, they have greatly expanded the number of eligible couples, and fear the cost implications. The question "What other benefit for what other employee group is so capped?" was met with silence.

While the [graduate student union] contract is a "done deal", the precedent this sets for other negotiations is troubling. It is hard to imagine being told that while you meet all the eligibility criteria for a benefit, you cannot receive it because too many others have already registered for it. This is not only the denial of a benefit under these circumstances, it also a degrading of our relationships ("We'll put up with only so many of you"). Yet that is the very real prospect that [graduate student union] members face, and that others might if this becomes a pattern in future agreements. It is worthy of note that no such cap applies to faculty and non-unionized staff. It is imperative that as the Coalition approaches its negotiations, it not only bargains successfully for [ODB] benefits, but that it resist all efforts by the administration to write such a cap into its contract.

While NMWU generated a sense of opprobrium within the union and the LGBT community for its cap on health benefits enrollments, GLU successfully avoided this trap by instituting an age requirement for all ODB recipients. The director of the faculty union at GLU indicated that while she considered the institution's age clause to be

discriminatory, there was not enough concern within the union to create opposition to the new plan.

It's hard because it's not an issue that you would strike over for a union. I mean it seems really unfair, but then you have to – like what can we do about it? And if the membership is saying, you know, it doesn't bother us... you know, you need to have the support of the membership. Know what I mean? And it's – so it put the graduate students in a really horrible position.

Both of these examples, however, show the role that unions played in actualizing the implementation of ODB policies on university campuses in Michigan. Institutional obligations to comply with established contractual arrangements led to continuity and stability. On the other hand, the specifics of what the unions were able and willing to negotiate reveal differing levels of commitment to various campus constituencies (the LGBT community, graduate students, faculty, staff, etc).

What are the implications, for my study, of the union role in procuring health benefits for same-sex partners and family members? Union creation and expansion is a deliberate strategy to ward off the corporatization and the associated restructuring of higher education (AAUP, 1993; Rhoades, 1998). As such, the logic of coalition bargaining runs directly counter to the logic of the marketplace. Interestingly enough, in this instance, both logics converge to embrace the notion of expanding, rather than restricting, access to health benefits. First, union contracts served as temporary shield to preserve domestic partner benefits. The length of the union contracts gave individual employees and the universities time to adapt to the changes in the regulatory environment. Second, the ability to negotiate health benefits for same-sex partners was viewed as a legitimating factor by the unions; at all three universities, unions organized

and negotiated for ODB policies not only because they believed their unmarried members deserved the benefits, but because it legitimized the function of the organization itself. As Meyer and Rowan point out, the sense of legitimacy that is generated by formal policies and programs is often more critical to organizational success (in this case both the union's and the university's than the functional effect (health benefits for same-sex partners) of the policy itself (1991).

Political Logics

One of the weak points of neoinstitutional theory, as conceded by two of its ardent proponents, is its almost exclusive attention to *cognitivism*. In a compendium on neoinstitutional theory, Powell and DiMaggio write:

We agree with Alexander (1987) that the goal must be a sounder multidimensional theory, rather than a one-sidedly cognitive one. Indeed, one of the key purposes of the conference to which this volume can be traced was to expand the universe of discourse in institutional theory to include researchers whose work placed more emphasis on the strategic and political elements of action and institutional change (1991, p. 27).

Brint and Karabel further emphasize that neoinstitutionalists have much to learn from Selznick's work, which focused on the pursuit of organizational interests and the "role of group struggle in shaping organizational structures and policies" (1989). In keeping with these critiques, I place interest and power at the heart of my analysis by including the consideration of political logics in decision-making about same-sex partner benefits. Indeed, the following elements emerge as highly legitimate political considerations in

the study: university board politics, national politics related to religion and sexual diversity, and—last, but not least—the politics of research itself.

Board politics played a role in how each university adapted to the ban on domestic partnerships, the extent to which it participated in legal action to oppose it, and how it communicated with the campus community about the issue. Michigan's system of independent, publicly elected boards is different from that of most other states. Each of the universities has a governing board that is dedicated solely to that institution. This structure, codified in the state constitution, gives independence to each of the boards and helps protect the universities from political interference in Lansing. However, board accountability to the statewide electorate also means that hot button public referenda heighten regents' concerns about majority opinions. The passage of the same-sex marriage ban in 2004 and the affirmative action ban in 2006, signaled the souring of the Michigan public toward both sexual and racial minority groups. Outside of small, socially liberal counties in Detroit and a few other isolated spots, Michigan voters were not in the mood to consider non-majoritarian views.

Nowhere in this study is the impact of political logics related to university board politics clearer than in the case of NMWU. At NMWU, the board's conservative political history demanded a delicate and proactive response by university leadership. Well versed in their board's history of squeamishness around gay issues, officials at NMWU went quickly and quietly about developing an ODB policy that would cover former domestic partners and extend eligibility to unmarried heterosexual partners as well. One informant, a faculty member, described his organization's experience in this way:

At the time that the Court of Appeals ruling came down, the university president came to us quietly, off the record—invited himself to our annual meeting to say, “We don’t know what’s gonna happen. We’re not sure what we’re going to be able to do at this stage. I’ve got my legal staff working on it. We are gonna find something that we can do.”

Interviewer: So he came to a [faculty and staff organization] meeting?

Yeah. Annual members’ meeting. Then he also said to us in the course of that, “The more public noise you make about this, the more difficult it’s going to be for me. Because I’m afraid that if you go out and start demanding a response from the university now, before we know what our legal options are, you’re gonna force me to commit to positions that I don’t wanna be forced to commit to at this stage.” And he said, “Therefore, I would just really prefer we keep this quiet for now.” We understood the politics of the issue. We essentially agreed to do that, and –

Interviewer: Explain the politics issue a little bit more to me. Who were the players?

Respondent: Players are public pressure on the Board of Trustees. And that had always been the group—since the time that the university was looking to approve domestic partner benefits, at the first stage of all this. We were always told that the university administration would not move until the Board of Trustees had told it what it was going to be able to do.

That was under an old president. Under a new president, he came to us and said, “I’m gonna do something. I don’t know what,” but our interpretation—and he was a little bit careful about what he said about this, so I don’t wanna put words in his mouth—but certainly, our interpretation of it was “to the extent you go public, the trustees are going to start drawing their own conclusions about this, they’re gonna start putting pressure on me to say something in response to this, and the kind of pressure I’m gonna get from them is going to push us in the direction of a response that says, ‘There’s nothing we can do. The courts have ruled. It’s over.’” So by not going public, he was hoping to keep the space open to find a more creative response that would comply with the law, but would also then start to address the kinds of issues that we were concerned with.

The leadership’s reliance on administrative back- channels and proactive communication with gay and lesbian advocacy units on campus enabled it to inoculate

the board from political pressure, ultimately giving the President the latitude to implement the policy he felt was in the best interest of the institution.

Higher Education Politics Related to Sexual Diversity

Data from the study demonstrates that while diversity and inclusion were strategically understood to include sexual minority issues, none of the universities in the study were willing to publicly frame the retraction of domestic partnership recognition as a form of discrimination against gays and lesbians or to advocate against it as such. At each of the three universities, political decisions were made that reflect deep social tensions related to sexual diversity. This is notably different from the reaction to Michigan's affirmative action referendum, which passed two years later (in 2006), which all of the universities openly opposed and which was framed as an issue of discrimination. Respondents at all three institutions remarked upon the fact that the issue of same-sex partner benefits received much less attention than the issue of affirmative action. What were the political logics that kept Michigan's public universities silent on one referendum against an historically discriminated against group and righteously, publicly opposed to the other?

However, for two years prior to that it involved an equally political, and deliberate, silence on the question of gay rights and the impact of Proposition 2 on Michigan. At one university, the combination of a large, decentralized campus, uncertainty about the future, and the University's public silence on the issue created frustration and anxiety in the gay community. While the central administration focused

its energies on battling affirmative action, gay faculty and staff were left feeling abandoned and disappointed.

The one thing that I've always felt saddened by is when the other Proposition 2 came down on affirmative action, the President had this meeting where she spoke publicly—it was a huge event with television. And she gave this address where she said, "We have to follow the law. And therefore we will not use race anymore when we do admissions. We believe it's wrong, but we have to follow the law."

So she took this public stance. I was at that event. And it felt so good to see her and hear her do that. And to see that she really seems serious and sincere about it. She didn't do something about this Proposition 2 like that. I was never conscious of a public statement that she made about this. So I have a lot of respect for her. But I'm disappointed that she didn't also take the same public stance about this issue.

A staff member, who worked with students, was similarly critical of the university president for not taking a position on the same-sex marriage ban:

Part of what I feel sometimes around LGBT issues institutionally is—I have no doubt about the President's commitment to LGBT people—and yet I think the responses, the resources available for work related to LGBT issues is secondary. And often, when the commitment to diversity is talked about, it's really a code word in the minds of many people for race and ethnicity, not even gender, not even women issues anymore. It's really race and ethnicity...

He continued:

[The President's] response to Proposition 2, in my opinion, was weak. It was certainly supportive, but when you juxtapose it to how aggressive and outspoken and opinionated the institution was around the affirmative action issue, in a lot of people's mind in the community, it was weak. I actually got lots of emails from faculty and staff about how they felt her response was weak.

For gay faculty and staff, the administration's handling of the same-sex benefits issue signaled the parsing of gay rights from other social justice issues. Regardless of the University's final structural adaptation, feels of alienation lingered among these

respondents. They saw a disjuncture between the administration's internal communications stressing inclusion and diversity and its public reduction of the issue to one of recruitment and retention.

A look at the amicus brief submitted by the institution does not significantly alter the picture painted by these respondents. It is premised on two narrow claims: 1) that contemporary recruitment practices require it to offer same-sex partner health benefits for recruitment and retention purposes, and 2) that the university is entitled to constitutional autonomy in matters of personnel and hiring. Another amicus brief, also submitted on behalf of the plaintiffs (by a group called National Pride at Work), focused on the social and economic disadvantages that gay and lesbian families would suffer if the court interpreted Proposition 2 to mean that public employers could not offer domestic partner benefits. In other words, of all the legal arguments this particular university could have chosen to make, it decided upon one that eschewed issues of social equality and community inclusion. Though inclusion and diversity were invoked in the university's communications with faculty and staff, the contents of the brief and interviews with key decision-makers make it clear that market logics -- national and international competition for faculty -- were its primary concern. In the end, the university's external communications and legal strategies were largely influenced by political logics, which required that it divorce the issue of domestic partnership from larger issues of fairness and social justice.

However, the deep affective responses to the issue by members of the gay community reveal the destructive power of this symbolic omission. The following is an excerpt from an LGBT newsletter on one campus:

Election results are in, and my mood keeps swinging from depression and bitterness toward a resolve that we must keep fighting.

Michigan voters passed Proposal 2 by an overwhelming margin, and unfortunately was not unique. Every state that had anti-gay marriage amendments on the ballot this year passed them. We feel depressed and bitter as we have yet again been disenfranchised and disrespected as our neighbors have voted to reinforce our status as second-class citizens. It is not an easy pill to swallow...

An African-American woman, who ended up leaving the state with family because of the passage of the anti-gay marriage amendment, had this to say about her administration's handling of the issue.

I felt like [the retraction of DB benefits] had an immediate impact on families right away, and it saddened me because it thrust us into a job search immediately. Because there was no way I could take the risk of not knowing whether or not my partner and daughter was gonna be covered. I couldn't take that risk. So it was very daunting, and there was a group of us that got together immediately to talk to the president. Now I felt like that conversation could've gone better... There could've been more empathy and sympathy from the administration. I just felt like they did us kind of hard.

A third respondent replied this way to the same question:

It's like you know you're gonna lose, and yet, when you wake up the morning after and you see that you have it's despair, anger, bitterness, a horrible sense of injustice, maybe a little self-pity—or probably a lot, to be honest. I like to think that people are mostly good, so I don't like to ascribe evil motives to them. I wanna believe that people didn't know what they were doing. I wanted to believe that people didn't realize how they were hurting the LGBT folks in the state. I wanted to believe that they believed that they were just making an affirmative statement about heterosexual marriage. And I understand that a lot of people have fear about gay people, but it's still – it was very hurtful. It's just one of those

things where you think, “I don’t understand why people don’t empathize with folks who are not equal.”

The reference to second-class citizens in two of the quotes above are representative of a large number of informants’ responses to this question. Both gay and straight respondents employed the same terminology, indicating that the symbolic degradation of Proposition 2 not only impacted the gay community, but also impacted heterosexual respondents with deep commitments to diversity and social justice.

State Politics Related to Sexual Diversity

Through the enactment of Proposition 2, the state of Michigan has distinguished itself as a state remarkably hostile to gay and lesbian citizens. A representative from the ACLU, who helped litigate the original Kalamazoo case for National Pride at Work, said:

There's not many state ACLUs that have specific LGBT projects, but our executive director looked at what was going on in Michigan, the increasing conservative nature of our legislature and our courts and the rise of a number of organizations that were anti-gay in Michigan, and felt that it was very important that the ACLU have a specific presence focusing on LGBT issues and decided to start this project.

Interviewer: Very interesting. Can you rattle off the names of a few of those organizations for me?

Well, the American Family Association, the Michigan Family Forum, I'm just looking at our Michigan supreme court, there were a number of decisions that the new supreme court majority had issued in just a matter of a couple of years that were harmful to LGBT families and to recognition of LGBT relationships... I have to admit, I have to tell you that I'm part of this legal roundtable of LGBT legal organizations, and again, we're considered one of the worst states. We're considered – and it's in terms of our amendment, the way it was interpreted, we're in the bottom of the barrel of five states of having the most restrictive amendment in the country. We are written off as a lost state in terms of being able to bring any litigation, and in terms of not only LGBT civil

rights, but civil rights in general. We're kinda looked on as a joke right now.

The flip side of this perspective is that university non-discrimination policies in some manner contribute to violations of religious freedom. Links between Proposition 2 and faith-based organizations in Michigan are easy to establish: the American Family Association played a primary role in getting the referendum on the ballot, a Christian legislator played a key role in attempting to convince the Michigan Legislature to adopt the measure, and the Catholic Church provided the *plupart* of funding for the general election campaign. Since the passage of Proposition 2, Michigan has further distinguished itself as a sympathetic haven for Christians with strong antitheses to homosexuality. Examples include the controversy over Julea Ward and her eviction from Eastern Michigan University's counseling program because she refused to counsel a fellow student because of her sexual orientation (Monson, 2010), and the Assistant Attorney General's public persecution, via personal blog, of the openly gay President of the University of Michigan Student Assembly (Brusstar, 2010).

The political nature of the same-sex benefits issue is closely related to divergent religious views on homosexuality. Faith-based differences divided Michiganders on the topic of same-sex marriage, breaking up blocks of voters who might otherwise have been loathe to retract the rights of their fellow citizens/other minority groups.

University leaders and board members in Michigan were highly aware that same-sex marriage was a hot topic on the pulpit and that any public defense of same-sex couples or the so-called "homosexual agenda" would incite attack. This politically fraught atmosphere and the universities' dependence on public appropriations and good will,

gave them the political motivation to eschew public debate on the issue of same-sex benefits. By contrast, as the data here show, universities in Michigan were willing to stake political capital on affirmative action—in part because religious divisions did not apply to that issue.

What are the implications of the intersection between national politics related to religion and sexual diversity on my study? Christian organizations in the state caught a groundswell of conservative political momentum that was sweeping the nation and played a leading role in putting the initial referendum before the voters, pursuing political funding and filing legal actions. Faith-based objections to the recognition of same-sex unions are based on notions of morality and sexual behavior. Various religions (Catholicism, Evangelical Protestantism, Mormonism, Conservative Judaism, etc.) have institutionalized heterosexual privilege as a value – as such, any government or higher education logic that puts same-sex couples on the path to equality (in this case, legal recognition for domestic partners) challenges this very logic.

However, higher education is a secularized industry that largely supports liberal democratic notions related to the expansion, rather than the contraction of individual rights, particularly those of historically discriminated-against groups. In response to the referendum, the three universities all developed policies that expanded access – not only to the same-sex partners who had once had domestic partnership benefits, but to unmarried heterosexual couples as well. This is not to say that married couples do not receive unearned privilege in the academy, including faster tenure and promotion rates because of the institutionalized value given to heterosexual marriage (Astin and Milem,

1997; Mason and Goulden, 2002, 2004). But the space that is created for nontraditional couples within the institution reveals that there is, at least, a culture of tolerance. In sum, the conflict between conservative religious logics related to marriage and the more liberalized academy provides a clear example of divergent logics between religion and higher education.

While public support for same-sex marriage is on an upswing⁵⁶, federal and state protections lag far behind those of other historically discriminated against groups, making legal action uncertain. At the same time, homophobia on the right (as well as on the left) make any discussion of rights for same-sex couples politically fraught. In this climate of hostility, particularly acute in Michigan, all of the universities in the study chose to sidestep the larger topic of discrimination. They avoided any discussion of rights by focusing their legal arguments and public statements on narrow recruitment rationales. Though they ultimately acted in the material interests of their gay employees, the fact that all three universities eschewed any public defense of gay relationship rights reveals awareness of conflict over the issue in society at large. The value of racial diversity has been institutionalized within higher education. Therefore, it remains true that within the higher education community, it is generally agreed that racial diversity is a desirable goal, and that this goal is linked to the public good. The same is not yet true of sexual diversity.

⁵⁶ Five states and the District of Columbia now provide marriage licenses to same-sex couples, compared to just one state in 2004. An additional two states recognize same-sex marriages from other states. (HRC, 2010)

Strategic Logics

Strategy can be defined as the “determination of the basic long-range goals and objectives of an enterprise, and the adoption of courses of action and the allocation of resources necessary for carrying out these goals” (Chandler, 1962, p. 13). In his work on institutional planning and transformation in higher education, Dill suggests that a clear definition of institutional mission is the most effective way to provide strategic coherence and integration. In this view, the goal is to develop strategic criteria that “address the means by which a college or university defines the niche in which it will choose to compete, and the social values by which it will shape its scale, scope, and core competence” (Dill, 1997, p. 188). The critical link that Dill articulates between mission and strategic planning underscores the importance of symbolic action in organizational decision-making.

For the purposes of analysis, I identify two elements of institutional mission—diversity and inclusion—which form the normative basis for institutional decision-making related to same-sex partner benefits. As demonstrated in the previous chapter, the three campuses in this study share a consensus that research universities should foster diversity and inclusion. (See pp. 129, 140, and 144, respectively.) In addition to the comments of executive leaders, the brief filed by the universities demonstrates a clear concern about diversity.

In a joint brief, IHU and GLU argue that private businesses adopt same-sex benefits as an important recruitment and retention tool. Just as private businesses do, the universities contend that they must be able to seek out and retain a quality

workforce. Fundamental to this argument is the recognition that gay and lesbian employees represent a newly acknowledged, and relatively untapped, form of diversity.

A landmark event demonstrating the growing economic significance of DPB was the collective decision of the Big Three Automakers to offer such benefits to their nearly 500,000 employees in 2000. They continue to offer those benefits today.

“In a joint statement, the automakers said ‘offering health care benefits to same-sex domestic partners is consistent with each organization’s commitment to diversity in the workplace and is responsive to competitive trends among Fortune 500 companies.’” Monica Emerson, director of diversity for Daimler-Chrysler said offering the new benefits, aside from being the “right thing to do” was an effort to attract the best workers... ‘All corporations that want to be competitive will find themselves forced to cast wider nets to attract the best and the brightest.’”

The Employee Benefit Research Institute (“EBRI”) reports that the “attraction to employees of a comprehensive benefits package that offers health and retirement coverage is well-documented. In today’s tight labor market, designing a benefits package that appeals to a diverse work force enables and employer to maintain a recruitment edge and communicates that the employer values a diverse work force.”

These sentiments are echoed in the specific statements of companies implementing DPB programs. “A Lockheed Martin Company Spokesperson explained the company’s 2003 decision to begin offering domestic partner benefits saying, ‘we have to look at what’s best for the future of Lockheed Martin. The workforce is becoming more and more diverse. We need to be able to attract and retain our talent.’” (as cited in National Pride at Work, 2005, p. 7)

By quoting these industry sources, the universities underscored for the Michigan courts what they view as the critical link between diversity and competitive recruitment processes. Same-sex benefits are a necessity prompted by the increasing diversity of the workforce, which increasingly includes self-identified gays and lesbians.⁵⁷ The

⁵⁷ Considering the recent explosion in numbers of Americans who identify themselves as gay or lesbian (see Chapter I, p. 16), the notice taken of the LGBT population by in industry is not surprising.

institutional logics revealed in this argument indicate a strong relationship between diversity and the ability to compete with other universities and private industry for talent.

In spite of a near-universal consensus that one important role of the university is to foster diversity, gay respondents at all three universities felt that the state retraction of domestic partner benefits had been given short shrift by their respective administrations. The disenfranchisement of gay faculty and staff indicates a deeply held ambivalence about the placement of gay and lesbian-related issues under the umbrella of “diversity” within the university setting.

The feeling that the universities had not advocated against Proposition 2 or against the court interpretation of the amendment as forcefully as they might have was particularly strong at one university in the study. (See pp. 193 – 195 for the voices of individual respondents.) Because of its size, the ranking of its programs and its acknowledged academic prestige, this university prides itself on its leadership in academics, sports, development and more recently on issues related to the advancement of underrepresented minorities. In 2003, two high profile lawsuits challenging its affirmative action admissions policies were heard by the United States Supreme Court. The University won one of these cases and effectively lost the other, setting the scene for a national adjustment in higher education admissions standards for undergraduate education.

Three years after these high profile cases and two years after the passage of Proposition 2, voters in Michigan passed a second “Proposition 2,” this time amending

the state constitution to prohibit the use of affirmative action.⁵⁸ Shortly after the election—and to dramatic effect—the University President stood up on the quad and delivered a highly publicized speech in support of race-based admissions policies, affirming the University’s commitment to admitting students from underrepresented populations and vowing to challenge the amendment. The three universities in the study jointly filed for an injunction, hoping to get a stay from the court. A six month injunction was granted and then promptly overturned by the 6th Court of Appeals, which ordered the universities to immediately comply with the law. When the U.S. Supreme Court turned down the case for review in January of 2007, the battle ended. The effect of the anti-affirmative action Proposition 2 and the President’s speech against it, was not only to compel the university in question to restructure its admissions policies along different admissions criteria less beneficial to historically discriminated-against minorities, but to expose it to great public scrutiny in the process. Because of its leadership on the topic of affirmative action, respondents at other the other universities in the study frequently made reference to this particular university as the model institution by which they measured the leadership qualities and social progressiveness of their own institutions.

Several respondents closely associated with the offices of the president and the provost (at the University described above) reported that in the wake of the battle over affirmative action, a strategic decision had been made to protect the institution and its president from further political exposure. This raised an interesting recall issue among

⁵⁸ The first proposition 2 (prohibiting the recognition of domestic partnerships “for any purpose”) was passed by voters and codified in the Michigan constitution in November of 2004.

respondents at different campuses, several of whom thought that the anti-affirmative action proposition came before the anti-gay marriage proposition. In reality, the order of events occurred in reverse; that is to say the Proposition 2 of primary interest in this paper was passed in 2004, while the anti-affirmative action proposition passed two years later in 2006. One reason for this confusion is undoubtedly the high profile nature of the affirmative action cases that were brought against the institution and ruled upon by the U.S. Supreme Court prior to the marriage amendment in 2003. These events created an atmosphere in which winning the affirmative action fight was viewed not only as a significant legal challenge, but as crucially important to the institution's commitment—both symbolic and actual—to diversity.

At the state level, the affirmative action fight was also seen as an important measure of Michigan's climate. Given its large and economically disadvantaged African American population center in Detroit, its white and affluent suburbs and its history of racial discord, the affirmative action cases touched upon deep social tensions within the state. Armed with the knowledge that the end of affirmative action would whiten their student bodies, higher education institutions, including those in the study, rallied to the cause with public statements and legal briefs opposing the ban.

Therefore, the decision of the universities not to take a stance in opposition to the same-sex marriage ban may well have involved strategic logics related to the passage of the ban on affirmative action at the end of 2006 because, in the eyes of many constituents inside and outside of Michigan's public higher education system, diversity is synonymous with race. By standing up for racial diversity, the universities in

the study were able to symbolically—and strategically—do the right thing. Further, by allocating large amounts of resources and time to the issue of racial diversity, they inoculated themselves against the charge that they were interested in anything other than educational equity and a diverse student body. However, this very expenditure of time and money also provided cover for the fact that none of them engaged in similar advocacy around the issue of same-sex benefits.

The universities in the study that filed briefs on the topic of Michigan’s same-sex marriage ban made arguments based on their constitutional autonomy to hire and provide benefits to the employees of their choice. These arguments were appropriately couched in terms of Michigan’s constitutional status.

The constitutional autonomy accorded to the respective governing bodies of the state universities to control and direct all expenditures from the institution’s funds and exercise general supervision of the institution is clearly provided by Const 1963, art8, §5. The courts of this state have long recognized that this constitutional grant of autonomy vests the governing boards of the state’s universities with “the absolute management of the University and the exclusive control of all funds received for its use.” Conversely, the Marriage Amendment addresses neither employee benefits or health care, nor universities. Indeed, one must stretch to read into it any applicability to the Universities. (National Pride at Work, 2005, p. 20)

Nonetheless, this argument bears an important relationship to the validity of the court’s interpretation of Proposition 2 under the 1st Amendment of the U.S. Constitution as well. This link to the broader academic freedom argument was nicely articulated in an AAUP amicus brief in support of the universities’ argument.

In speaking of the First Amendment’s guarantee of academic freedom, Justice Felix Frankfurter long ago observed: It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there

prevail ‘the four essential freedoms of a university’ – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Sweezy v New Hampshire*, 354 US 234, 263 (1957) (Frankfurter, J., concurring). In the preceding section of the argument, we have demonstrated that by providing same-sex domestic partner benefits to faculty and staff, the university is directly advancing its educational mission by sending a message of non-discrimination and proclaiming the values of tolerance, diversity, inclusion and equality. The right of the universities in Michigan to send this message of non-discrimination and to proclaim these values is part of the academic freedom of the university protected by the First Amendment.

The AAUP argument underscores yet another similarity between the affirmative action cases and the issue of same-sex health benefits.

The question apt to this study is why the fight over same-sex partner benefits didn’t assume the same strategic importance for the universities in the study that affirmative action did. What logics dictated that institutions in question would take such a passive response to a referendum that had such negative implications for diversity in the state? Though the ban on affirmative action did not strip health benefits away from any families, it did affect a larger number of people—students, in particular. Michigan’s anti-affirmative action measures were directed at students, both in number and energy arguably the lifeblood of the university. Naturally, young persons’ ability to access higher education was a more cogent political issue, particularly in the university community, than the more private personal affairs of older faculty and staff. Moreover, while battles over racial equity are firmly ensconced within higher education’s conception of the public good, there is evidence that issues related to sexual diversity, because they are still contested in society at large have yet to be institutionalized in the same manner. I shall return to this issue in the conclusion.

Interplay of Logics over Same-sex Health Benefits among Universities in the Study

Figure 6, below, depicts the interplay of contested logics explained in this chapter. In the figure below, the magnitude of each logic is represented by the size of the circle it inhabits. (E.g., data demonstrate that market logics prevailed among the institutions in the study.) The circles on the left side of the page (showing market and diversity logics) generally worked in favor of the (re)extension of benefits to same-sex partners, while the circles to the right (indicating compliance and political logics) generally worked against implementation of the ODB policies. In this schematic, the reader can see the manner in which compliance logics competed against market and diversity logics. Similarly, political logics constrained university action and provided push-back against the market forces. Cost containment emerges as one of the initial goals of the market logic, while recruitment and retention (an ongoing concern) overlaps with logics related to diversity and inclusion. In a similar manner, political logics are bolstered by the presence of even more compelling concerns related to compliance. Federal policy, with its attendant dearth of protections for gay and lesbian citizens and state policy (Proposition 2 and Proposition 02-06) both restrict the rights of sexual minorities. Political logics located at the level of the field related to sexual orientation and specific to Michigan overlap with public policy and limit the extent to which market and diversity logics prevail. Michael Cox's "plus one program" loophole is depicted creates the opportunity for universities to enact market and diversity logics through the implementation of the new ODB policies.

Equity Logics

This study focuses on the explicit logics articulated by participants. However, there are more deeply buried logics that also appear to be present, but which are suppressed, perhaps due to political expediency or heteronormative bias. One of these is an equity of logic, which demands that gay employees get the same treatment as heterosexual employees. Because equity under the law is not available to same-sex partners, participants in this study were reluctant to specify or to explicitly acknowledge an interest in equity. Not surprisingly, the exception to this self-imposed pattern of censorship were gay faculty members. In every instance, LGBT respondents framed the issue of access health benefits for their partners and family as an issue of equity. Gay respondents made it very clear that in their view justice demanded the equal treatment of gay and straight employees in the form of equal access to health benefits.

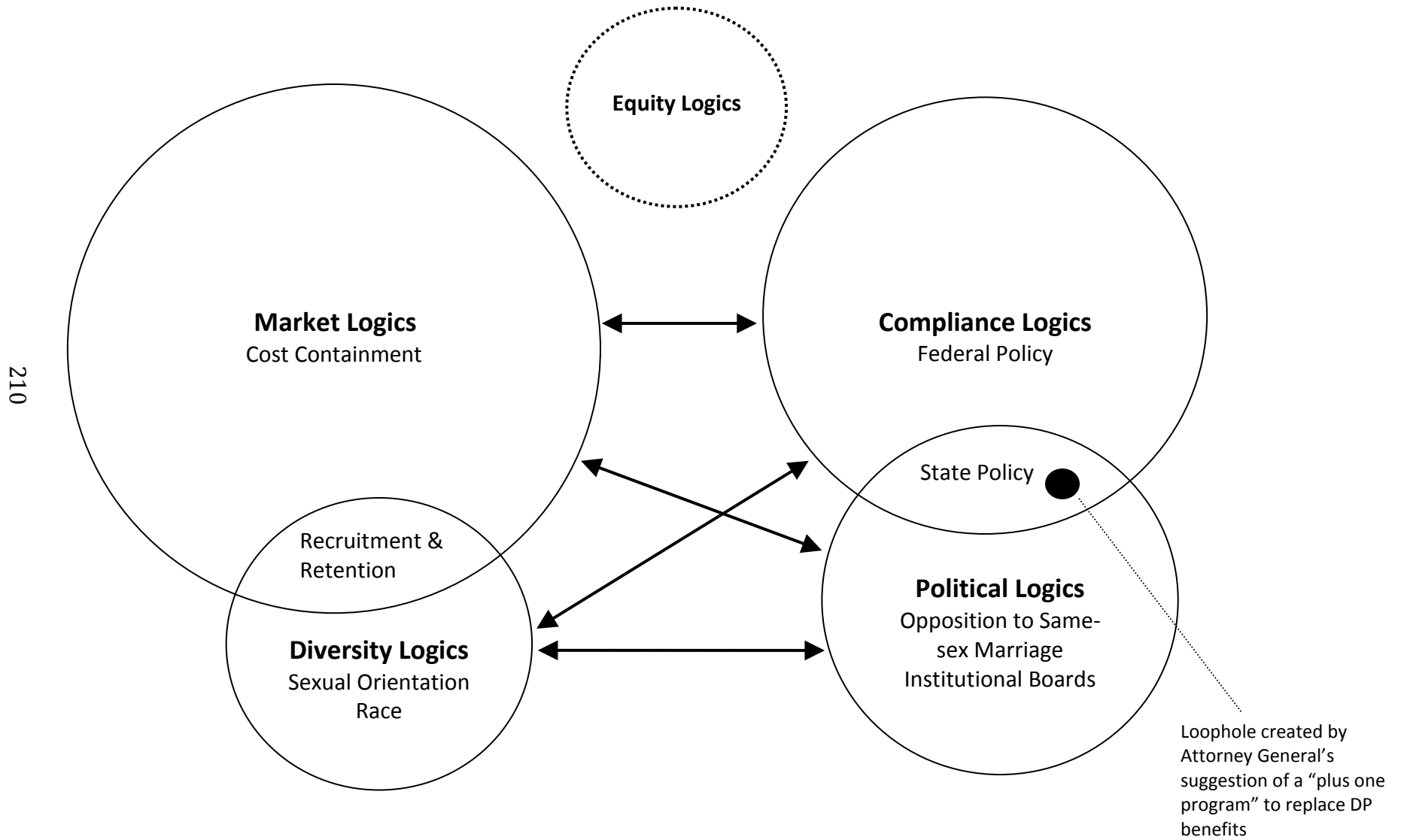
However, it should be noted that equality concerns were not limited to gay participants. See the passage below, for example. This respondent, who held a position as an executive administrator at her institution, and who was by training an attorney, clearly hesitated to *talk* about equality. However, her emphasis on unspecified “values and commitments” suggests a concern for fairness.

We're a public institution, and so—but it's a public institution that has a set of values and commitments to members of the community who also has to look at the future of our ability to maintain the quality of the institution, which means we've got to have the best minds available to us.

I think the institution doesn't feel like that means we'll limit it to heterosexuals. So for us, I think it was very simply a commitment to our community, and our community includes LGBT community members.

Though it plays a subdued role in relation to the other logics evident in the data, equity considerations do appear to have played a role in propelling institutions in the study to continue to offer same-sex partner benefits. The suppression of equity logics could be investigated more thoroughly in a future iteration of the study.

Figure 6. Interplay of Logics over Same-sex Health Benefits



Chapter Summary

This chapter presents the four principle logics at work among institutional decisionmakers at institutions in Michigan following the passage and implementation of Proposition 2. It reveals that market logics, compliance logics, political logics and strategic logics prevailed in that order, respectively. Less obviously, a logic of equity also appeared to be at work among some respondents. The fact that these logics were contested reveals tensions between the values held within higher education and among external institutional orders. At the beginning of the chapter I discuss the interplay of logics and why they are presented in atomistic fashion. At the chapter's close, I provide a map demonstrating how the heterogeneous logics conflict and the overlapping goals that exist among them.

CHAPTER VIII

CONCLUSION

Implications of Selected Findings

One of the challenges of this project was examining the linkage between public policy and organizational change. In order to accomplish this, I first had to decouple the normative assessment of Michigan's Proposition 2 from the organizational adaptations of the universities. Decoupling accomplished, I was then free to return to the institutional logics approach to explore the interplay of logics in the data. *This bidirectional exploration revealed that not one, but all six of the characteristic institutional logics identified by contemporary theorists— the market, the corporation, the professions, the state, the family and religions—are implicated in the struggle over same-sex health benefits (Thornton, 2004).*

The Predominance of Market Logics

The data in this study demonstrate that market logics played a critical and decisive role in the universities' decision-making on the topic of same-sex health benefits. Specifically, the goal of recruiting and retaining top faculty trumped every other consideration on the table. This research demonstrates that market logics are

capable of disrupting the relationship between the state and public higher education, a finding that lends support to Dobbin and Sutton's contention that the failure of the state to assert its authority results in the development of rationales located in the legitimacy of the market—rather than the state (1998). The institutional ordering of the external environment, in which market concerns supercede those of the state, is mirrored in the contest between state regulators and university adaptations to the new law. This is an interesting proposition when one considers that publicly controlled universities are not only corporate bodies, but agents of and answerable to the state itself.

In my view, the reliance on market-based rationales is not only highly persuasive because it falls in line with the hierarchy of the larger institutional order, but because it allows institutions to eschew entirely the conflict between liberal democratic conceptions of the state and the instantiation of faith-based beliefs in it via public policy. By basing their principle arguments in market terms, universities in this study were able to avoid a highly contentious debate (and possibly litigation as well) over the topic of same-sex marriage. This strategic choice, however, came with a downside. The deliberate silence of public universities on the Michigan marriage amendment itself left some faculty feeling let down. Perhaps more critically, higher education's silence left a gap in the public discourse about the effects of the marriage amendment on gay civil rights. While public institutions of higher education adapted institutional policy to accommodate same-sex partners, the repeal of domestic partnerships in Michigan rendered all same-sex relationships invisible—and the reluctance of public higher

education institutions to frame the issue in terms of discrimination did nothing to dislodge the veil that had dropped.

Cost Containment

In a period of fiscal austerity, cost containment is a critical concern in public higher education. The squeeze in Michigan is particularly acute. While the average cost of university health benefits increases by approximately 12% each year (Reid, 2008), state appropriations for higher education are falling faster than anywhere else in the nation (Kelderman, 2010). Successive increases are forcing many institutions to alter the ratios between what employees and employers contribute by reducing the percentage that the institution pays out (Reid, 2008).

At the same time, access to healthcare is especially critical for gay and lesbian partners whose families who suffer inequitable tax treatment under state and federal law. In an analysis of the federal share of this differential tax structure, Badgett (2007) calculates that employees with partners who receive employer-provided coverage pay an average of 8 percent more in payroll taxes than their married counterparts. The cumulative financial disadvantage of these inequities cannot be over-emphasized.

In addition, same-sex partners are often not recognized as such under the law and do not have access to the federal safety net. (See section titled *The Rising Cost of Health Care*, in Chapter I for a thorough discussion of this point.) Even gay and lesbian families who can afford to hire legal counsel to assemble piecemeal protections related to healthcare and other rights are constantly at risk that individual contractual documents (such as Power of Attorney, which can be used to make medical decisions on behalf of a

loved one or nonbiological children) will expire or be rendered void by a change in public policy. Increased litigation and policy dispersion relating to relationship recognition and parenting responsibilities, a higher percentage of jobs without health benefits (Schmitt, 2007) and the spiraling cost of healthcare (Reid, 2008) suggest that the ability of institutions to work within or around state legislation restricting health benefits will become a critical to future recruitment efforts in higher education (Wayne State University, 2007).

Cost containment emerges as a highly variable dimension in this analysis. Initially it surfaces as a market logic that diverges with other logics. Decision-makers at all three universities were concerned that benefits enrollments would rise substantially under the new ODB programs. As a way of limiting institutional exposure, two institutions implemented exclusionary cohabitancy and age clauses, and one placed a cap on enrollment benefits for graduate students. Another institution forestalled implementing a “plus one program” until after the Supreme Court decision. In other words, at the onset universities in the study viewed cost containment as a factor that worked *against the logic of recruitment and retention*, because a “plus one program” opened the door to an unknown number of new enrollments from opposite sex partners. After the new ODB programs were implemented, enrollments increased. Nonetheless, the number of new enrollments fell short of what had been projected. This emboldened university administrators to remove the “pilot” nomenclature from each of the programs, making ODB a permanent feature of health benefits at each university.

We can draw two conclusions from this course of events. First, initial concerns about cost were overblown. Though comparisons between the number of enrollments for DP policies versus ODB policies show clear increases, none of the universities responded by cancelling the policies or further restricting the universe of eligibility. Second, once universities discovered that the cost of providing the benefit was reasonable, emphasis shifted from material considerations—impact on the budget—to cultural considerations. While the focus remained on recruitment and retention, universities realized that the cultural cost of not providing benefits far outweighed the material cost of providing them. *This finding highlights a practical consideration related to the recruitment and retention of gay faculty: namely the symbolic importance of offering same-sex partner benefits. But it also points toward a new theoretical avenue of interest. How and when is it that material logics cross over into cultural considerations? What are the determinants and consequences of such migrations?*

Diversity and Equity Logics are Muted

At the beginning of this research project, it was thought that logics related to social justice, equity and inclusion would play an important role in how universities responded to Michigan's Proposition 2. Instead, I discovered that these logics played a muted role in organizational adaptation to the new regulatory environment. In part, this is due to the fact that there are few legal protections for sexual minorities and, therefore, few legal strategies that public institutions can employ to push back against the state. However, as demonstrated, several nonprofit organizations submitted legal briefs urging Michigan's courts to take the inequities and cumulative disadvantages

faced by gay and lesbian citizens into account as they considered whether or not the marriage referendum should affect access to public health benefits. By contrast, universities in the study intentionally forefronted narrower claims related to constitutional autonomy and their ability to compete for talent. Though maintaining a diverse pool of applicants is implicit to the recruitment argument, universities did not highlight the desire to diversify the faculty by sexual orientation.⁵⁹ Instead, the evidence suggests that political logics suppressed diversity logics. (See Figure 6, *Interplay of Logics in relation to Same-sex Partner Health Benefits*, Chapter VII.)

In spite of this emphasis, clear links do exist between the universities' desire to recruit the best and their desire to integrate the faculty. As a result of concerns about imbalanced racial and gender representation, universities across the nation have addressed pipeline issues through hiring, promotion and retention strategies that include diversity hiring programs, dual career initiatives, faculty mentoring programs and ADVANCE projects— just to name a few. Broadening or diversifying the pool of applicants from which faculty are selected is the conceptual cornerstone of all these efforts. A pivotal report issued by the National Academy of Sciences articulates the general concern this way: “The U.S. economy relies on the productivity, entrepreneurship, and creativity of its people. To maintain its scientific and engineering leadership amid increasing economic and educational globalization, the United States must aggressively pursue the innovative capacity of *all* of its people” (Committee on Maximizing the Potential of Women in Academic Science and Engineering, 2006, p. 1).

⁵⁹ Links found in the university briefs linking diversity and competitive recruitment techniques are covered in the Strategic Logics section of Chapter VII.

While the term *diversity* usually refers to hiring underrepresented minorities and women in fields where they are underrepresented, recent research from Stanford suggests that same-sex couples may be particularly receptive to some recruitment initiatives, such as dual career programs (Schiebinger, Henderson & Gilmartin, 2008). The authors note that geographic limitations related to public policy and higher percentages of dual-earner households constrain the mobility of gay and lesbian academics, heightening considerations related to partners and children. In one sense then, diversity represents a market-based strategy for identifying talented people and recruiting them to the academy.

However, diversity is much more than a numerical argument. A philosophical framing conceptualizes integration of the academy through a more sophisticated lens that accentuates its intrinsic value. Rather than focus on identity politics, Anderson focuses on the role of elites in society. She writes:

Let us call “elites” those who occupy positions of responsibility and leadership in society: managers, consultants, professionals, politicians, policy makers. In a democratic society, elites must be so constituted that they will effectively serve all sectors of society, not just themselves. They must perform in their offices so that the inequalities in power, autonomy, responsibility, and reward they enjoy in virtue of their position redound to the benefit of all, including the least advantaged. This requires that elites be so constituted as to be systematically responsive to the interests and concerns of people from all walks of life. (2007, p. 596)

Higher education faculty, who bear responsibility for educating successive generations fall into the category of elites. Moreover, faculty interact directly with students, who in some cases themselves will become the next generation of elites. Given the generative role that faculty play in this pluralistic society (St. John, 2009), it seems particularly

important that they “be systematically responsive to the interests and concerns of people from all walks of life.” Next, Anderson outlines the criteria required to build a responsive elite:

Its membership must be drawn from all sectors of society, including the less advantaged. Moreover, these diverse members must be educated together, so that they can develop competence in respectful intergroup interaction. A democratically qualified elite must be an elite that is integrated across all the major lines of social inequality and division that characterize it. (2007, p. 597)⁶⁰

Certainly sexual orientation represents one of the major lines of social inequality in contemporary society. The stigma and legal discrimination faced by gays and lesbians arguably qualify them as members of the “less advantaged.” It can be argued therefore, that actively recruiting gay and lesbian faculty and staff is another way of diversifying the elite. Anderson’s articulation, though framed for elites more broadly, seems particularly apt in the context of higher education, where professors serve a dual role as elites and as trainers/gatekeepers to the elite itself.

What do these conceptions of diversity have to do with same-sex health benefits? On the one hand, they underscore the linkage between market logics related to recruitment and retention and diversity logics related to race, gender and sexual orientation. On the other hand, they demonstrate that connections between the two are still contested within the field of higher education. This research highlights conflict between compliance and political logics on the one hand (which pushed against offering benefits to same-sex partners), and market and diversity logics on the other (which pushed toward offering same-sex benefits). These conflicting logics resulted in broader

access to university–sponsored health benefits. *This shift heralds an emerging logic within higher education: specifically, recognition of sexual diversity as a new source of human capital and market share. The implicit acknowledgment that gay faculty bring excellence and diversity to campus can be seen in the increased willingness to shoulder an increased financial burden for recruitment and retention purposes, even in a decade of austerity.*

Summary

In spite of the universities adaptations, Prop 2 represents a clear step backward for sexual minorities in Michigan. Cost considerations led to more exclusive ODB policies than the old DP policies. New age and cohabitancy requirements exclude some same-sex couples who formerly would have had access to health coverage. This culture of inequity is reinforced by greater social and legal inequities. The austerity of the Michigan climate is especially rough on the gay and lesbian population because of structural inequities related to income tax and other cumulative financial disadvantages. As the analysis on pages 143 and 144 demonstrates, gay couples at one university in this study pay more than three times the amount their married peers pay for health coverage.

Moreover, the safe harbor provided by Michigan’s universities to its gay and lesbian employees and their families is imperfect. One university’s cap on the number of gay student employees who can receive benefits sends an ambiguous message that seems to say “we will tolerate you as long as there aren’t too many of you.”

This study shows that fight over same-sex partner benefits didn't assume the same strategic importance for the universities in the study that affirmative action did. What logics dictated that institutions in question would take such a passive response to a referendum that had such negative implications for diversity in the state? In large part, the answer lies in federal constitutional protections that enabled the universities to challenge the state of Michigan. But the answer also lies in normative definitions of the term "diversity." The contrast between the universities' outspoken response to the anti-affirmative action referendum and their silence on the anti-gay marriage referendum suggests that while higher education embraces a normative consensus that racial equity is a desirable form of diversity, sexual diversity has yet to be institutionalized in the same manner. This is not to suggest that there is racial equity in the academy—but that because the civil rights of homosexuals are still contested legally and socially, the value of sexual orientation as a generative form of diversity is only beginning to emerge as an institutional logic in higher education.

The implications of institutional conflicts over gay rights grow more and more obvious with each news cycle. The recent suicides of several gay college students highlight the disastrous results that accrue when families, colleges and peers abandon developmentally vulnerable students who are wrestling with sexual identity issues. Gay youth need mentors. Faculty and staff are not simply the end of the foodchain in higher education, but cultural actors with tremendous power to create community, define expectations, pass on first-hand experience and provide hope for the future. Just as recruiting underrepresented minorities and women provides valuable role models for

students, recruiting and retaining out gay faculty has become an imperative for creating inclusive and truly diverse campus communities. The immense popularity of Dan Savage's "It gets Better" Project attests to the need for more support at every stage of the precollege, college and graduate levels.

There is more to be explored regarding the interplay of cultural and material logics. However, a couple of observations emerge from this paper. First, disparities (perceived or actual) between cultural and material considerations can be problematic. This was demonstrated in the case of IHU, where the administration ultimately crafted the most inclusive policy of the three campuses, but where the universities' symbolic action fell short of gay employees' expectations. Second, emphasis on material logics obscures the importance of cultural considerations. In other words, recruitment and retention are not only important for material reasons, but because a culture of acceptance is best cultivated by a truly diverse faculty that includes gays and lesbians. Third, a strategic commitment to inclusion and diversity also carries with it important material considerations. As noted by one respondent, lip service is not enough: resource allocations signal how important the needs of the gay campus community are (or aren't) within the campus community.

INTEGRATING THE HUMAN CAPABILITIES APPROACH WITH DATA FROM THE STUDY

The interplay of institutional logics presented at the end of Chapter Seven (see Figure 6) reveals that same-sex health benefits occupy contested terrain within higher education. As Michigan's universities grappled with the dilemma of whether and how to

continue offering health benefits to same-sex partners, market, compliance, political and diversity logics emerged as conflicting considerations. The evidence demonstrates that equity and fairness, however, were downplayed by institutional decisionmakers. This stood in sharp contrast to the views of individual gay and lesbian respondents, nearly all of whom viewed either same-sex benefits and/or same-sex marriage as a fairness issue. Does the backgrounding of the fairness issue suggest that higher education institutions in Michigan were not concerned with the inequitable treatment of gay faculty and staff?⁶¹ Or does it merely reflect the political and legal constraints faced by institutions?

Empirically speaking, the answer is unclear. There is always the danger that *post hoc* rationalizations of behavior presented by respondents may skew perceptions of what actually occurred. At each of the universities, there was some talk of equity—but it seemed to be symbolic, aimed at placating gay and lesbian campus constituencies—rather than a mechanism that drove policy development. There was also evidence that the issue of same-sex benefits was conceptually linked to diversity. This link might suggest that equity was a concern that was suppressed by political logics.⁶² Ultimately, however, each university developed a new policy that would allow it to continue to offer same-sex partner benefits—in spite of cost concerns, political pressure and the

⁶¹ We know conclusively that concerns about equity for unmarried opposite-sex couples were not the driver for the development of the new policies. The broadening of the universe of eligibility was initially resisted by the universities, as shown by the exclusionary age and cohabitancy clauses built into the policies, because they feared the financial repercussions.

⁶² Political logics that prevailed were located both at the level of the field (institutionalized concerns about racial diversity, but not sexual diversity) and at the level of the organization (e.g., a conservative board of trustees with a history of antagonism towards gays).

lack of federal protections for gay and lesbian citizens. In my view, this outcome and the invocation of certain vague, unspecified “values” in several instances should be interpreted as indications equity or fairness concerns were involved, even if they remained largely tacit.

Borrowing from Habermas, one might call the development of the ODB policies an example of “postconventional moral reasoning,”⁶³ on the part of the universities. But the discursive space, required in the Habermasian reconstruction of Kohlberg’s theory is not present in the data. Thus, we might ask whether it is possible to reach a postconventional solution through conventional moral reasoning. Indeed, this framing might be appropriate, because it was the Attorney General’s concession that a “plus one program” would be permissible that opened the door for the universities to simultaneously offer same-sex health benefits and to comply with the new regulatory environment. It is interesting to speculate that if the Attorney General had not provided that loophole, the distinction between postconventional and conventional reasoning could have been tested. In such a (hypothetical) case, the universities would have had to dismantle the DP policies. Then, they either would have developed or borrowed a new model to correct for the state’s injustice (such as Google’s parity pay plan—see description below) or simply eliminated the benefits and left LGBT faculty and staff to fend for themselves. The former provides an example of postconventional moral reasoning that seeks to understand the underlying determinants of the problem and to

⁶³ Habermas reconceptualized Kohlberg’s theory of moral development in relation to action, a reformulation that provides a useful basis for rethinking professional action in higher education (Habermas, 1990; St. John, 2009).

envision a new solution, while the latter is an example of conventional moral reasoning that uses conventional standards of practice and justice to develop solutions (St. John, 2009).

Another way to frame the universities' response to Proposition 2 is to turn to philosophy and the concept of political liberalism to assess the tacit ideologies at work within higher education. Nussbaum writes "[political] liberalism has always stood for something, and has always asked people to endorse something: the equal worth of persons and their liberty" (2004, p. 61). *Political liberalism* is a technical term, used in political philosophy, which seeks to avoid comprehensive theories of good in order to provide an inclusive system of cooperation, in which people of multiple religious and nonreligious persuasions can coexist peacefully. It is an integral part of Rawls' conception of a system of cooperation in which everyone, persons of faith included, subscribe to political values of liberty and opportunity as one part of their overall view of life. As envisioned in this system, political culture is a module that is *attached to* personal beliefs, because it takes no stands on controversial religious matters. Instead, it respects the desires of every group to live in freedom and mutual respect. Nussbaum writes: "In this way, Rawls envisages the coming into being of an 'overlapping consensus' that will include all the major conceptions of value prevalent in a pluralistic society." The concept of political liberalism, then, allows us to separate religious beliefs from the function of the state. Under its precepts, therefore, public institutions have to limit claims to equality to state-provided goods and goods regulable by law (e.g., antidiscrimination law).

There are good reasons to believe that the academy embraces the notion of political liberalism. Note—for example—that none of the universities addressed the civil rights issues underlying the referendum against gay marriage. While this elision is also consonant with the desire to avoid political retribution, it perfectly exemplifies the practice of political liberalism. If the universities had taken a stand on the issue of gay marriage, they would have violated the basic principle, because public institutions are not authorized to take extralegal arguments into account. One can argue, therefore, that political liberalism is alive and working within the public sector of higher education. This brings us to a deeper understanding of how equality functions in the analysis. In other words, the institutions did provide “equality” to gay and lesbian employees under the law.

However, since the equal worth of persons is true only to the extent that it is enshrined in the law, and lesbian and gay rights are as yet *not enshrined in law*, the equal worth of homosexuals does not exist. This point must be emphasized, because it provides us with insight into the heart of the moral problem (or in the Habermasian construct, an understanding of how the problem of gay marriage and same-sex benefits emerged in the first place). Referring back to the “overlapping consensus,” described by Rawls in the preceding paragraph, Nussbaum writes:

There may be views that refuse to join the consensus⁶⁴: religions, for example, that preach intolerance, or conceptions holding that blacks, or women, should not have equal political and civil rights. The holders of such views will not be persecuted, because strong norms of free speech

⁶⁴ Of course, when Nussbaum refers to a consensus, she refers not to public opinion polls which are now extremely close on gay marriage and homosexual rights, but to the legal fabric that enforces the social contract.

apply to all citizens, but they will rightly be regarded as “unreasonable,” in conflict with the basic social consensus. Their proposals, insofar as they do conflict with that consensus, will not be able to come up for straightforward majority vote: constitutional principles entrenching the basic freedoms and rights of the consensus will prevent (as they do now) the U.S. Congress from debating a motion to restore slavery or to remove women’s right to vote. (2004, p. 61).

The use of race and gender as examples highlights the fact that we stand, at this moment, in the midst of a movement toward gay civil rights in the United States. The diffusion of statutory and constitutional law eliding gay rights provides evidence that the social consensus that currently excludes same-sex couples is being contested. It also demonstrates, somewhat ironically, that lynchpin of gay civil rights in our society may well prove to be the redefinition of the heterosexual institution of marriage.⁶⁵

Under the constraints of political liberalism, the issue of same-sex health benefits at public universities highlights the dialectic between equality and fairness. The universities acted justly and fairly by providing health benefits to their same-sex couple employees. But same-sex couples remain unequal to their heterosexual colleagues, both in terms of their access to employer-sponsored healthcare (because of exclusionary clauses) and the social and financial inequalities that exist beyond the workplace. Among Michigan’s research universities, the problematic issue that remains is the exclusionary clauses⁶⁶ that were added to the new policies. As I propose in *Suggestions for Practice*, below, the elimination of these exclusionary clauses would demonstrate the universities’ commitment to placing LGBT employees on equal terms

⁶⁵ Here I refer to the high profile legal cases related to DOMA and California’s Proposition 8 that are headed towards the Supreme Court.

⁶⁶ Eligibility restrictions such as age, length of cohabitancy and enrollment caps, as discussed in Chapters Six and Seven.

with their heterosexual employees. With cost concerns now ameliorated and the absence of conflict with the principle of political liberalism, no good reason exists to maintain these exclusions.

Suggestions for Practice

1. Do benchmarking against industry. Industry has innovative human resource policies that colleges and universities can learn from. By way of example, Google recently instituted a policy which provides compensation for the federal taxes that all gay employees must pay on health coverage for their partners and their partners' dependents.⁶⁷ (Married couples are exempt from federal taxation on spousal benefits.) The company also made other changes that help equalize conditions for gay employees, including eliminating a one-year waiting period for infertility benefits and adding domestic partners to its family leave policy (Bernard, 2010). While Google is not the only, nor the first company to implement such a policy (the Gates Foundation also provides such a benefit), its prominence suggests that other employers may follow. The poaching of faculty and executive administrators from the public sector by private institutions is commonplace (Fogg, 2004; The Ticker, 2010). Public institutions could gain a leg up on the recruitment and retention of gay faculty by being the first to institute parity measures such as the one described here.
2. Collect data to determine how many students and employees at the university identify as gay or lesbian. Convene working groups of employees to find out what the campus climate is like and how it can be

⁶⁷ According to the *New York Times*, domestic partners pay an average of \$1,100 more per year for the same benefits that married couples receive (Bernard, 2010). Over the course of a marriage or partnership, the cumulative financial disadvantage that accrues to same-gender couples as a result of structural inequities such as this one are substantial.

improved. What are their challenges, frustrations and points of satisfaction? Evaluate how the data can be used to equalize the campus climate.

3. Move lesbian and gay issues to the center of diversity initiatives. Stop replicating the culture of marginalization from the larger society. Work to institutionalize the value of sexual diversity and the benefits it brings to the university community. Dual-career initiatives, for example, have become critical to higher educational institution's ability to recruit and retain star faculty. Developing funding sources for gay hires would be one innovative way of increasing faculty representation. A higher percentage of gay and lesbian couples live in dual-earner households, making this population potentially very receptive to initiatives of this type (Scheibinger, Henderson & Gilmartin, 2008).
4. Remove enrollment caps, cohabitancy and age requirements from current ODB policies. These exclusionary provisions disadvantage gay and lesbian families by making healthcare less accessible than it was under the old DP programs. This study demonstrates that the number of same-sex couples enrolling in the new benefits plan has either increased incrementally (as in the case of NMWU and GLU) or fallen substantially (as in the case of IHU). Moreover, the market and compliance logics that were used as rationales for these provisions have since been ameliorated. Institutions now have a good handle on the number of opposite sex couples who are likely to enroll, and ODB policies clearly meet the requirements of the new regulatory environment. Thus, universities in Michigan have the opportunity to signal their commitment to a diverse and inclusive campus environment by eliminating unnecessary barriers to healthcare coverage. Removing exclusionary provisions may well go far in persuading new recruits with nontraditional families that they will be welcome in the state, and convincing others

that they are truly valued. As a University of Louisville Trustee succinctly phrased it: “We are not endorsing any lifestyle. We are simply recognizing that people are people. We are recognizing the world we live in” (Russell, 2007, p. 6).

Contributions of the Study

This study contributes in substance and theory to the higher education literature. First, it explores the issue of same-sex health benefits in more detail and with more methodological rigor than any other study to date. It provides us with insight into the institutional logics at play among Michigan’s universities and gives us a basis for examining the issue among colleges and universities in other states. The empirical data here provide evidence of a new, emerging institutional logic in higher education: one that expands existing conceptions of diversity to include sexual orientation. Moreover, the unique design of the study permits an in depth examination of the relationship between public policy and institutional change. While other research has examined organizational change or public policy issues related to higher education, few have explored the complicated intersection of these two phenomena in as much depth. Last, not least, this study adds to a small body of higher education literature that borrows from the discipline of political philosophy. By harnessing the Human Capabilities Approach, it introduces a normative framework into higher education policy evaluation that forefronts social justice concerns with the attendant rigor of systematic argumentation.

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